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IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951, AFL-CIO AND CLC,
Petitioner,

NATIONAL LABOR RELATIONS BOARD,
Intervenor,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE FEDERAL COURTS HAVE JURISDICTION PURSUANT TO SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. §185:

(1) TO REVIEW THE AWARDS OF ARBITRATORS ENTERED IN UNION SERVICE FEE DISPUTES, ARISING PURSUANT TO A COLLECTIVELY BARGAINED UNION SECURITY CLAUSE AND A SERVICE FEE REBATE PROCEDURE ESTABLISHED PURSUANT TO *COMMUNICATION WORKERS OF AMERICA V. BECK*, 487 U.S. 735 (1988); AND

(2) TO CONFIRM, MODIFY OR VACATE SUCH ARBITRATION AWARDS UPON THE SAME LIMITED STANDARD OF REVIEW UTILIZED IN THE REVIEW OF OTHER LABOR ARBITRATION AWARDS.

PARTIES TO THE PROCEEDING

The Parties to this proceeding are Petitioner (Plaintiff) United Food and Commercial Workers Local 951, AFL-CIO and CLC; Respondents (Adverse Parties/Defendants) Phillip Mulder, Charles Buck and Leon Gibbons; and Intervenor National Labor Relations Board. UFCW Local 951 is a labor organization as defined by the National Labor Relations Act, 29 U.S.C. §152(5). Respondents Mulder, Buck and Gibbons are employees of a non-party employer in commerce that is signatory to a collective bargaining agreement with UFCW Local 951. Respondents Mulder, Buck and Gibbons have resigned from membership in the Union, but are still members of the bargaining unit represented by UFCW Local 951, and pay union service fees to UFCW Local 951.

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No. _____

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UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951, AFL-CIO AND CLC,
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PHILLIP MULDER, CHARLES BUCK,
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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, United Food and Commercial Workers Local 951, AFL-CIO and CLC, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-captioned proceeding on July 15, 1994. (Petition for Rehearing with Suggestion for Rehearing *En Banc* denied by the United States Court of Appeals on August 23, 1994).

OPINIONS BELOW

The July 15, 1994 Opinion of the United States Court of Appeals for the Sixth Circuit is reprinted in the Appendix, *infra*, at A1. The August 23, 1994 Order of the United States Court of Appeals for the Sixth Circuit is reprinted in the Appendix, *infra*, at A55. The January 12, 1993 Opinion of Judge Gordon J. Quist of the United States District Court for the Western District of Michigan, Southern Division is reprinted in the Appendix, *infra*, at A15. The October 1, 1992 Report and Recommendation of Magistrate Judge Joseph G. Scoville is reprinted in the Appendix, *infra*, at A28.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185, the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and 28 U.S.C. §1331.

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 and the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*

STATEMENT OF THE CASE

The case at bar is an action to confirm an arbitration award. Petitioner United Food and Commercial Workers Local 951, AFL-CIO and CLC (hereinafter "Local 951") and non-party Meijer, Inc., a retail store chain, are signatory to a collective bargaining agreement. The agreement contains a Union security clause governing membership in the Union and, in lieu of Union membership, maintenance of non-member status in good standing. *See* Appendix, *infra*, at A58. The Union security clause requires bargaining unit members who are not members of the Union to pay a service fee to defray the costs of Union representation.

In an effort to comply with this Court's ruling in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), Local 951 established a service fee rebate procedure (hereinafter the "procedure"). *See* Appendix, *infra*, at A62. The procedure calls for the annual calculation of the portion of the service fee attributable to collective bargaining, contract administration and grievance handling. The procedure also contains an appeal mechanism which may be invoked by non-Union, bargaining unit members who object to the Union's calculation of the chargeable portion of the service fee. *See* Appendix, *infra*, at A65. The procedure's appeal mechanism culminates in arbitration conducted in accordance with the American Arbitration Association's Rules for Impartial Determination of Union fees. *See* Appendix, *infra*, at A66.

On July 27, 1990, the first arbitration award was issued pursuant to the procedure by Arbitrator George T. Roumell, Jr. The award affirmed Local 951's calculation of the chargeable portion of the service fee for the 1988 and 1989 membership years. On July 24, 1991, Local 951 filed a complaint in the United States District Court for the Western District of Michigan to confirm the arbitration award.[1] On cross-motions for summary judgment, the District Court denied Local 951's motion to confirm. *See* Appendix, *infra*, at A28. (Magistrate Judge's Report and Recommendation) and A15 (District Court Opinion and Judgment).[2]

On February 4, 1993, Local 951 appealed to the United States Court of Appeals for the Sixth Circuit which, on July 15, 1994 affirmed the decision of the District Court. On August 23, 1994, the Court of Appeals denied Local 951's timely filed Petition for Rehearing with Suggestion for Rehearing *En Banc*.

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[1] The National Labor Relations Board intervened in the case at bar and unsuccessfully sought to stay proceedings pending the outcome of an unfair labor practice complaint instigated by Objectors and others against various locals of the United Food and Commercial Workers Union [NLRB Case No. 16-CB-3850 (2-25, 27-34)]. Said case remains pending before the NLRB. Following denial of the motion to stay, the NLRB took no active role in this case.

[2] On September 14, 1992, Local 951 filed a second complaint (Case No. 1:92 CV 653) in the District Court to confirm the 1991 arbitration award. Said case was consolidated with the previously filed action.

REASONS FOR GRANTING THE WRIT

I. It is in the Interest of Judicial Economy to Foster Informal Dispute Resolution Mechanisms such as Local 951's Procedure by Affording a Narrow, Regularly Imposed Judicial Avenue of Appeal Identical to the Standard Applicable to the Enforcement or Review of Other Labor Arbitration Awards.

A private sector labor union is entitled to collect service fees from objecting non-union members who are employed in a bargaining unit represented by the union. *See Communication Workers of America v. Beck*, 487 U.S. 735 (1988). The service fee rebate concept originated in the transportation industry, in this Court's decisions in *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); and *Machinists v. Street*, 367 U.S. 740 (1961).

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court drew upon the transportation cases to set the constitutional foundation for the public sector employee agency shop. *Abood* established the public sector union's right to require contribution from all employees in the bargaining unit, and thereby avoid "free riders" who obtain the benefits of union representation without having to contribute toward the cost of the union's efforts. *See Abood*, 431 U.S. at 237. This Court acknowledged the union's right to contribution even upon consideration of the free expression implications of compelled contribution from public sector employees. *See Abood*, 431 U.S. at 222.

The *Abood* decision contained the genesis of the public sector service fee rebate procedure utilizing arbitration:

> In view ... of the fact that since the commencement of this litigation appellee Union has adopted an internal Union remedy for dissenters, it may be appropriate to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.

See Abood, 431 U.S. at 242. This Court, having thus endorsed the use of arbitration and other informal non-judicial methods of resolving service fee disputes, prompted public sector unions to develop such procedures as a matter of course.

In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court acknowledged that a procedure utilizing the "advance reduction of dues and/or interest bearing escrow accounts" adequately protected constitutional rights in the transportation industry. *See Ellis*, 466 U.S. at 444. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), even further precision was imposed upon the definition of constitutional adequacy for public sector rebate procedures:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

See Hudson, 475 U.S. at 310. *Hudson*, generated in the public sector where First Amendment rights are sacrosanct, endorsed impartial fee determination without regard to whether the objector "agreed" to submit to the arbitral forum.

This Court drew upon all of the foregoing agency fee/service fee precedents in establishing the rule of law in the first private sector service fee case—*Communication Workers of America v. Beck*:

> We conclude that Section 8(a)(3), like its statutory equivalent, [Section] 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."

See Beck, 487 U.S. at 762-763, *quoting Ellis, supra*, 466 U.S. at 448. Collection of service fees for non-representational purposes, over the objection of the non-union member, therefore constitutes a breach of the duty of fair representation.

In contrast to the public sector and the transportation industry, wherein fees collected without adequate safeguards implicate constitutional First Amendment rights, a private sector union's most egregious failure to provide an adequate rebate procedure amounts, at worst, to a breach of the duty of fair representation as defined by Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158 §(a)(3). The standard for breach of the duty of fair representation is "arbitrary, discriminatory or bad faith conduct" toward a bargaining unit member. *See Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

In view of the broad standard established by *Vaca v. Sipes*, Local 951 is within its rights to establish an impartial, *neutrally administered* proceeding for the purpose of determining appeal of the final service fee amount where non-union members have raised objection. In the analogous context of contract

grievances, the National Labor Relations Board will routinely defer to arbitration awards arising from fair and regularly conducted arbitration proceedings, irrespective of member "consent."[3] *See Olin Corp.*, 268 NLRB No. 86, 115 LRRM 1056 (BNA) (1985). A union fully discharges its duty of fair representation by submitting an employee's dispute to arbitration. In all such duty of fair representation cases, the signatories to the agreement are the union and the employer—*not* the union and the aggrieved employee.

The National Labor Relations Board also defers issues arising pursuant to its own statute to fair and regularly conducted arbitration proceedings. *See Collyer Insulated Wire*, 77 LRRM at 1936. As the Board held in *United Technologies Corp.*, 268 NLRB No. 83, 115 LRRM 1049, 1052 (BNA) (1984):

> [D]eferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed.

As applied to the facts at bar, the deferral of the chargeability determination to a fair and impartial arbitrator selected by an independent agency (the American Arbitration Association) is entirely consistent with this Court's initial endorsement, in *Abood*, of informal dispute resolution procedures in

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[3] The National Labor Relations Board also maintains an institutionalized practice of pre-arbitration deferral where a dispute presented in the form of an unfair labor practice charge is susceptible of resolution through the established contractual grievance procedure. *See Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1931 (BNA) (1971).

agency fee disputes.[4] *See Abood, supra*, 431 U.S. at 242. Fee arbitration is further consistent with the standard for the duty of fair representation.

The service fee issue in the public sector—where First Amendment rights are zealously guarded—has evolved to the point where regularly administered service fee rebate procedures, which are not facially violative of the Constitution, are afforded deference by the courts. If informal avenues for dispute resolution (akin to contractual grievance arbitration provisions) are not bolstered by the stability of a regular, narrow avenue of appeal, then the floodgates will be opened to full scale litigation, pursuant to random standards, of the nickel and dime calculation of non-member service fees before the National Labor Relations Board, before the United States District Courts, and before all other imaginable judicial fora. Just as other labor arbitration awards are afforded presumptive validity and are subject to judicial review according to narrow standards, so too must service fee arbitration awards.

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[4] By way of further analogy, in the typical breach of duty of fair representation case, employees who wish to assert contractual grievances under §301 of the LMRA are required to "exhaust"—*i.e.* attempt a remedy through the contractual grievance procedure. *See Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1975). Only under extremely limited circumstances may an employee bring suit without first having exhausted internal union remedies. *See Vaca v. Sipes, supra*, 386 U.S. at 185.

II. This Issue at Bar is of the Very Nature Contemplated by This and Other Federal Courts that have Recognized a Broad Application of §301's Role in Fostering Labor Stability.

Federal Court jurisdiction to review labor arbitration awards emanates from §301 of the Labor Management Relations Act, 29 U.S.C. §185.[5] Section 301 provides, in pertinent part:

> (a) Venue, amount and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction

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[5] For the enforcement of private sector labor arbitrations in Michigan, the Federal Courts have borrowed the procedural time frames set forth in the United States Arbitration Act, 9 U.S.C. §9. *See Occidental Chemical Corporation v. International Chemical Workers Union*, 691 F.Supp. 1049, 1051 (W.D. Mich. 1987); *see also, Professional Administrators Limited v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639 (6th Cir. 1987). Where, as in the case at bar, the non-prevailing party at arbitration has taken no action to vacate or modify the award within the statutory time frame, confirmation is deemed "a summary proceeding, and not a method in which to secure affirmative relief." *See Occidental Chemical, supra*, 691 F.Supp. at 1052.

The relevant case authority also adopts the legal standard of the *Steelworkers Trilogy*, which provides that a labor arbitration award must "draw its essence from the collective bargaining agreement. *See Occidental Chemical, supra*, 691 F.Supp. at 1052, n.3, *citing, United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), *Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960) and *United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. at 574 (1960).

> over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

See 29 U.S.C. §185(a). Section 301 was broadly interpreted by this Court in *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1957). In *Lincoln Mills,* this Court articulated the broad authority of the federal courts to "fashion federal law" to resolve cases or controversies arising under §301(a). *See* 353 U.S. at 457.

This Court has further made clear its resistance to a narrow reading of §301:

> We would undercut the Act and defeat its policy if we read §301 narrowly as only conferring jurisdiction over labor organizations.
>
> [. . . .] We conclude that the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situtations. *Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.* The range of judicial inventiveness will be determined by the nature of the problem. (Citations omitted; emphasis added).

See Lincoln Mills, 353 U.S. at 456-457.

The legal viability of a service fee arbitration award issued pursuant to *Communication Workers of America v. Beck,* falls within the penumbra of §301's express statutory mandate. The foundational premise

of §301 was to make collective bargaining agreements enforceable in the courts by either party. *See Lincoln Mills*, 353 U.S. at 453.[6] The following excerpt from the Senate Report, quoted by this Court in *Lincoln Mills*, articulates §301's legislative purpose:

> The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. [. . . .] Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the federal courts.

See Lincoln Mills, 353 U.S. at 454. This Court anchored its generous reading of §301 in the Legislature's affirmation of the public policy favoring industrial peace. *See Lincoln Mills*, 353 U.S. at 455.

Section 301's broad mandate favors the expeditious enforceability of a service fee arbitration award, and application of the same narrow standard of review (*i.e.* presumptive validity) to labor arbitration awards issued pursuant to a collective bargaining agreement. In *Beck*, this Court left undisturbed prior NLRB cases addressing the

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[6] Section 301's legislative intent was to establish equilibrium between the employer and the union, so that a collective bargaining agreement would be equally enforceable at law with respect to each party. *See Lincoln Mills*, 353 U.S. 513-515, 517. The majority opinion in *Lincoln Mills* contains a concise discussion of §301's legislative history [*see* 353 U.S. at 449-459] and the appendix to Justice Frankfurter's dissent outlines the text of relevant legislative history from §301's predecessor, the Case Bill through the enactment of §301. *See* 353 U.S. at 485-546.

enforceability of union security clauses requiring "financial core" membership, recognizing in the NLRA's legislative history the policy that "free riders" who obtain the benefits of union membership without contributing to the cost of obtaining such benefits undermine the stability of labor management relations, and hence, restrict the free flow of commerce.[7] *See Beck,* 487 U.S. at 755-756.

The union security clause contained in the collective bargaining agreement between Local 951 and the employer, Meijer, Inc., is a contract between Local 951 and Meijer, Inc. *See* Appendix, *infra,* at A57. Disputes arising over the interpretation of the collective bargaining agreement are subject to the grievance procedure found in the collective bargaining agreement. However, the union security clause requires the Union to take responsibility for disputes arising pursuant to the implementation of the clause, and hence, disputes arising from the collection of the Union dues and service fees, in compliance with *Communication Workers of America v. Beck.*

The Union's entitlement to non-member service fees emanates from the union security clause contained in the agreement between Local 951 and Meijer, Inc., as does the Objectors' obligation to remit service fees. The union security clause is part of the overall consideration for the collective bargaining agreement. If the equilibrium of this consideration is

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[7] This Court's decisions in such cases as *Radio Officers Union v. Labor Board,* 347 U.S. 17, 41 (1954) and *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963) uphold the premise of "financial core" membership, whereby " 'membership' as a condition of employment is whittled down to its financial core." *See NLRB v. General Motors Corp.,* 373 U.S. at 742.

disrupted by the absence of an orderly and expeditious mechanism for impartial determination of objector service fees, then the employer will be deprived of the bargained-for "industrial peace" which §301 was intended to preserve. *See generally,* legislative history, *Lincoln Mills, supra,* 353 U.S. at 531.

This Court's decision in *Communication Workers of America v. Beck,* is itself premised upon the federal courts' §301 jurisdiction. It follows that the actions taken by a union in furtherance of *Beck's* mandate are also subject to review pursuant to §301. It has been widely held in the federal courts that §301 jurisdiction is dependent upon the nature or subject matter of the action, and not upon a restrictive analysis of the parties involved in the suit.[8]

Smith v. Evening News Association, 371 U.S. 195 (1962), further extended §301's conferral of jurisdiction to allow claims by individual employees to enforce contract rights:

> Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of §301 would stultify the congressional

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[8] *See e.g. Rehmar v. Smith,* 555 F.2d 1362 (9th Cir. 1976); *Trustees of Iron Workers Fund v. A & P Steel, Inc.,* 812 F.2d 1518 (10th Cir. 1987); *Painting and Decorating Contractors Association of Sacramento v. Painters and Decorators Joint Committee of the East Bay Counties, Inc.,* 707 F.2d 1067 (9th Cir. 1983).

> policy of having the administration of collective bargaining contract accomplished under a uniform body of federal substantive law. This we are unwilling to do.

See 371 U.S. at 200. Section 301 makes no specific grant of jurisdiction to individual employees; nonetheless, this Court allowed jurisdiction.

Since *Smith v. Evening News Association*, §301 has been even more broadly interpreted to confer federal court jurisdiction over non-signatory parties in a number of contexts.[8] In *Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services, Inc.*, 755 F.2d 499 (6th Cir. 1985), the Sixth Circuit set forth the following standard for non-signatory jurisdiction:

> We . . . hold that a district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, *where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract.* (Emphasis added).

See 755 F.2d at 506. Thus, §301 jurisdiction is warranted in the case at bar precisely because the

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[8] *See e.g., Wooddell v. International Brotherhood of Electrical Workers, Local 71*, _____ U.S. _____, 112 S.Ct. 494, 499-500, 116 L.Ed.2d 419 (1991), [this Court reaffirmed its holding in *Smith v. Evening News*, and held that §301's subject matter jurisdiction extends to "suits on union constitutions brought by individual union members"]. *See also Hillard v. Dobelman*, 774 F.2d 886 (8th Cir. 1985); *Local 472 of United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industries v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982); *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 379-81 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Cuyahoga Wrecking Corporation v. Laborers International Union of North America, Local Union No. 210*, 6444 F.Supp. 878, 883-884 (W.D. NY, 1986) [§301 conferred jurisdiction upon non-signatory "alter ego"].

duties of the non-signatory objectors are clearly stated in the union security clause of the collective bargaining agreement.

The very nature of the fee arbitration process further prevents this case from being viewed as a "suit against a member;" a configuration of conflict heretofore denied a forum under §301. *See e.g., Complete Auto Transit v. Reis,* 451 U.S. 401.[10] In collection of non-member service fees, the union is first required to calculate that portion of the total amount of member dues to which it is *not entitled.* This amount will not *decrease* during the appeal process, because it is the union's *own* calculation of the funds it disclaims entitlement to. Hence, the non-member objectors can only *gain* a *higher* non-chargeable percentage in the appeal process.

If the Objectors are dissatisfied with the arbitration award, the same arguments advanced by Local 951 herein would permit the Objectors to file suit to vacate the awards. If §301 jurisdiction does not exist for the Union to confirm, then it cannot exist for the Objectors to vacate. The lack of an orderly avenue of review and consistent well defined standards for review will prompt prolific litigation and scattershot precedents. Meanwhile, the efficient flow of commerce will be disrupted while efforts and resources are focused upon fee disputes. Section 301 provides a mechanism for handling fee disputes in as efficient a manner as other labor disputes subject to arbitration. This petition seeks the implementation of §301's full legislative intent in the context of *Beck* union fee disputes.

[10] This Court's ruling in *Reis* is narrow, and disallows §301 jurisdiction only in the context of disallowing damage suits against individual employees participating in an unauthorized strike.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed July 15, 1994.)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0245P (6th Cir.)
File Name: 94a0245p.06

No. 93-1308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951, AFL-CIO AND CLC,
Plaintiff-Appellant,

v.

PHILLIP MULDER; CHARLES BUCK; and LEON GIBBONS,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed July 15, 1994

Before: MARTIN, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this appeal, we are asked to determine whether, in a "service fee" dispute between a labor union and non-union employees, a federal district court has subject matter jurisdiction to confirm the decision of an arbitrator selected

pursuant to an internal union procedure to which the non-union employees did not agree to be bound. The action arose when the plaintiff-appellant, a labor union, filed an action seeking judicial confirmation of the amount of its rebate to the defendants-appellees, non-union employees who objected to the amount of the "service fee" that the union assessed them. The union asks us to reverse the district court's decision to grant the employees' motion for summary judgment, which was based on the court's determination that it lacked subject matter jurisdiction over this dispute. We agree with this determination and affirm.

The defendants are three non-union employees of Meijer, Inc. The plaintiff, Local 951, is the union that represents the bargaining unit in which the defendants work. Local 951 and Meijer, a non-party to this lawsuit, entered into a collective bargaining agreement that contained a "union security" clause requiring Meijer employees to join the union or pay "service fees" to defray the cost of collective bargaining on their behalf.

When the defendants objected in writing to the amount of the fee, the union set into motion its internal procedure for handling such objections. The last step in the union's "service fee rebate procedure" required arbitration by an arbitrator to be selected by the American Arbitration Association. The union's procedure also required non-union members to exhaust the union's rebate procedure before seeking judicial review of the fee dispute. Although one of the defendants orally agreed to arbitrate, none of the defendants signed an agreement to arbitrate or an agreement to allow arbitration to bind them by court order.

The union nevertheless went forward with its rebate procedure and, as a result, two arbitrators upheld the amount of the union's service fees assessed against the defendants. After the arbitrators issued their decision, the union brought action in federal district court to confirm the awards. The magistrate judge to whom the matter was referred found that because the defendants had never

agreed to arbitrate the dispute, no true arbitration award existed to be confirmed. He recommended that the district court grant the defendants' motion for summary judgment for lack of subject matter jurisdiction. The district judge agreed and dismissed the case. The union now appeals.

In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the United States Supreme Court held that § 8(a)(3) of the National Labor Relations Act authorizes a union to exact from non-union employees represented in a bargaining unit "those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Id.* at 762-3 (citing *Ellis v. Ry. Clerks*, 466 U.S. 435, 448 (1984)). By thus limiting the amount of dues a union can charge a non-union member, the Court exempted non-members from those parts of union dues that contribute to political activities, while simultaneously preventing a "free rider" problem. *Beck* held that when a union exacts fees in excess of the amount necessary to perform collective bargaining activities, it violates its duty of fair representation to all members of the bargaining unit.

Beck was the first case to address this limitation on "union security" clauses in the context of private sector employment. In public sector employment cases, where "the actions of public employers surely constitute 'state action'," the Court had previously held that First Amendment principles prevent unions from collecting service fees "for the support of ideological causes not germane to [the union's] duties as collective-bargaining agent." *Ellis v. Ry. Clerks*, 466 U.S. 435, 447 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 294 (1977). At least in public sector employment, the Court requires unions to create methods of dispute resolution available to non-members who object to the amounts of service fees. In *Chicago Teachers' Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), the Court held that "the constitutional requirements for the Union's collection of agency fees include . . . a reasonably prompt opportunity

to challenge the amount of the fee before an impartial decisionmaker. . . ."

The union in this case, Local 951, has presumed that this requirement is equally applicable to private sector unions. It argues that, given its authority to exact a service fee from the defendants, it can bind them to the internal procedure that it has developed for resolving disputes over the amount of the fee and, consequently, can prevent the defendants from challenging the fee before the N.L.R.B.

The district court, however, rejected each of the justifications put forward by the union to support judicial confirmation of its internal procedure. As a result, the district court determined, properly we think, that it does not have subject matter jurisdiction to hear the case.

1. *The Duty of Fair Representation*

The plaintiff's first argument is that because *Hudson* requires a union in a public sector employment setting to provide "a reasonably prompt opportunity to challenge the amount of the [service fee]," and because *Beck* holds that the failure to do so violates the union's duty of fair representation, then non-union members must be bound to the union's choice of dispute resolution. The union emphasizes, first, that the N.L.R.B. often defers to arbitration,[1] and second, that the Supreme Court has endorsed informal dispute resolution as method of solving fee disputes. *See Abood*, 431 U.S. at 242. Therefore, the union concludes, it can bind non-union employees to its chosen procedures as an inherent part of its duty of fair representation under its collective bargaining agreement with Meijer.

The problem with this proposition is that it confuses the union's presumed responsibility to provide a means of dispute resolution with its ability to *force* non-union

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[1] *See, e.g., Collyer v. Insulated Wire*, 192 N.L.R.B. No. 150 (1971).

members to use its selected method. At least one court has held that this duty on the part of the union does not create a corresponding ability to force unwilling parties to comply with the established procedure. In *Abrams v. Communication Workers of America*, 818 F.Supp. 393, 407 (D.D.C. 1993), the district court held that the union

> may have statutory authority to require nonmembers to pay agency fees, but that statutory authority cannot be extended to force nonmembers to follow [the union's] choice of dispute resolution. . . . [The union] must get nonmembers' permission before it can refer fee disputes to arbitration.

While the *Abrams* court recognized a "strong public policy preference for arbitration of labor disputes" in order to promote their "peaceful resolution," it insisted that when labor unrest is not threatened, as in a fee dispute, then arbitration is not as essential. In addition to *Abrams*'s reasoning, the *Hudson* case, requiring public sector employees' unions to develop fee rebate procedures for non-members, does not require the use of the procedures, but requires only that procedures be made available. *See Hudson*, 475 U.S. at 308. Finally, rather than limiting employees to a union's choice of forum, as the plaintiff asserts, the Supreme Court has acknowledged that employees have potentially more than one forum in which to litigate unfair labor practice claims. *Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967); *Smith v. Evening News Ass'n.*, 371 U.S. 195, 197 (1962). Thus, the union cannot unilaterally impose a means of resolution, and deprive non-members of the use of other fora.

2. *Section 301 of the L.M.R.A.*

The union's second argument in support of subject matter jurisdiction is that § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), contains a broad mandate for federal courts to decide labor issues arising out of collective bargaining agreements. Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction over the parties. . . .

The union cites legislative history emphasizing the development of a federal common law regarding labor issues, and then argues that suits to enforce this type of "arbitration" award should be decided under federal law pursuant to § 301. The union also cites *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 485 (1957), a case in which the Supreme Court compelled an employer to arbitrate with the union in accordance with a collective bargaining agreement, in support of its contention that federal courts have jurisdiction to enforce arbitration awards pursuant to collective bargaining agreements. Although the arbitration procedure used in this case was not outlined in the collective bargaining agreement, the union insists that because the defendants are obligated to support the "union security" clause in the collective bargaining agreement, they should be bound to any fee dispute resolution mechanism that the union develops.

The union's arguments overlook several important facts. First, although § 301 permits the enforcement of arbitration clauses in collective bargaining agreements between employers and unions, no agreement to arbitrate existed between the parties in this case. Arbitration requires a contract between the parties. In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-9 (1986)(citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)), the Court held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. . . ." *See also Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). Thus, the union's argument that arbitration "emanate[d]" from the collective bargaining

agreement ignores the fact that these defendants never agreed to settle their dispute by the union's method.

Secondly, the union overlooks that fact that the non-member employees are *not signatories* to the collective bargaining agreement, and consequently, under current case law, are not bound to the contract. In *Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services*, 755 F.2d 499 (6th Cir. 1985), *cert. denied*, 474 U.S. 850 (1985), this court held:

> [A] district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract.

Id. at 506.[2] *See also Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992)(finding no § 301 jurisdiction over non-signatories for tortious interference with contract; "[i]t is axiomatic that only a party to a contract can violate that contract"). Although the union argues that the "union security" clause is a sufficient basis for jurisdiction because it outlines the rights and duties of non-union employees, that clause obligates the *employer* to fire non-contributing employees. The agreement does not bind the defendants, nor does it state their rights and duties under the rebate procedure.

Although *Commercial Property* governs the grant of jurisdiction in § 301 cases involving non-signatories, the

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[2] In *Commercial Property*, the union sued a non-union company that was not a signatory to the union's collective bargaining agreement, and that had underbid the union's employer on a job contract. The union alleged that the non-signatory employer had a "close relationship" with the signatory employer and should be therefore be bound by the contract. The court held that § 301 jurisdiction would only be appropriate if the non-signatory employer was the "alter ego" of the signatory. *Id.* at 505.

union contends that case law from other circuits suggests that jurisdiction is appropriate over these non-signatories. *See, e.g., Painting & Decorating Contractors Assoc. of Sacramento, Inc. v. Painters and Decorators' Joint Committee of the East Bay Counties, Inc.*, 707 F.2d 1067 (9th Cir. 1983)(en banc); *cert. denied*, 466 U.S. 927 (1984);[3] *Wilkes-Barr Publishing Co. V. Newspaper Guild of Wilkes-Barr, Local 120*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).[4] This court distinguished these cases in *Commercial Property*, however, and insisted that the Sixth Circuit applies "a much narrower interpretation of the scope of section 301 jurisdiction." In *Commercial Property*, we observed that the other cases cited by the union involved close relationships between non-signatory parties and the

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[3] In *Painting and Decorating*, the plaintiff, a multi-employer trade group, sued the other parties with which it had a collective bargaining agreement, as well as the Joint Committee established to interpret the agreement, alleging that the Committee had erroneously interpreted the agreement. In reviewing the appropriateness of § 301 jurisdiction in a suit against the non-signatory Joint Committee, the court found the Committee's non-signatory status to be irrelevant and based its finding of § 301 jurisdiction on the subject matter of the suit. The Ninth Circuit held that jurisdiction existed as long as the suit concerned the terms of an employer-union agreement that was significant for labor peace. *Id.* at 1070-2.

[4] In *Wilkes-Barre*, a newspaper publisher sued the newspaper guild with which it had a collective bargaining agreement, as well as other local unions, which participated in a strike during the renegotiations of the agreement. The publisher also sued a newly-formed council of union leaders who began to publish a rival newspaper. The employer charged the guild with refusing to bargain in good faith, and sued the other unions and the council for encouraging a breach of the collective bargaining agreement and tortiously interfering with the contract. Although § 301 jurisdiction over the claim against the bargaining union was clear, the court exercised jurisdiction over the claims against the council as well, finding it to be "in the same position as the unions." *Id.* at 379. The court exercised jurisdiction over the tortious interference claim because the claim involved the federal common law of labor contracts. *Id.* at 381.

signatory parties. *Id.* at 506. That close relationship is clearly not present here.

In addition to these cases, the union's supplemental authority indicates that it has ignored the inapplicability of § 301 to non-signatories to the collective bargaining agreement in its effort to emphasize the expansive interpretation of § 301 jurisdiction. The union cites, for example, *In re General Motors Corp.*, 3 F.3d 1980 (6th Cir. 1993), a case in which this court found § 301 jurisdiction to exist when a General Motors's employee alleged that G.M. had violated his confidentiality as a participant in an "employee assistance program." The union and G.M. had bargained for the program in the collective bargaining agreement and, therefore, the court found it to be a contract over which it had jurisdiction. In *General Motors*, however, the plaintiff-employee was a union member and thus bound by the collective bargaining agreement. Hence, *General Motors* indicates that a party be a union member before being bound by the collective bargaining agreement.

In addition to *General Motors*, the union cites as supplemental authority *Local 217 v. J.P. Morgan*, 996 F.2d 561 (2d Cir. 1993), for an expansive reading of § 301 jurisdiction. In *Morgan*, the Second Circuit upheld § 301 jurisdiction in a case concerning a neutrality agreement, which is an agreement between the union and employer governing how a union can establish majority status without conducting an election. The union argues that the *Morgan* case illustrates that § 301 provides jurisdiction over supplemental agreements between a union and its employer. In *Morgan*, however, the court enforced the agreement only against parties to the contract, thus distinguishing it from this case involving non-signatories. Hence, *Morgan* does not aid the union in its assertion of § 301 jurisdiction in this case.

In addition to the union's failure to acknowledge the appellees' non-signatory status and the absence of an agreement to arbitrate disputes, the union also ignores the

fact that it cannot assert § 301 jurisdiction against individual employees in an action for money damages. Section 301 was created to make collective bargaining agreements binding on unions and employers equally. *See Lincoln Mills*, 353 U.S. at 454. Although § 301 contemplates suits between unions and employers for breaches of collective bargaining agreements, it also permits individual employees to sue as third-party beneficiaries of collective bargaining agreements. *See Smith v. Evening News Ass'n.*, 371 U.S. 195, 200 (1962); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). However, neither employers nor unions may sue individual employees in damage suits. In *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981), a trucking company attempted to allege a breach of a collective bargaining agreement in a suit against individual wildcat strikers. The Court dismissed the claim for lack of jurisdiction, stating that § 301 was intended to shield individual strikers from damage suits. *Id.* at 415; *see also Bldg. Material and Dump Truck Drivers v. Traweek*, 867 F.2d 500, 507-8 (9th Cir. 1989). Thus, under *Reis*, even if these non-union employees were responsible under the contract for fees, they could not be sued in their individual capacities for damages.

Apparently recognizing the weakness of its argument, the union finally suggests that this case in not adversarial. In its brief before this court, the union argues that "[t]he proceedings below were not so much against the Objectors as against the awards themselves." It even calls the defendants "Adverse Parties-Appellees" in its brief. However, as the district court observed, the union does not seek a declaratory judgment that its rebate procedure is appropriate, but rather seeks enforcement of a decision against these specific employee-defendants.

Finally, in supplemental authority that challenges the union's assertion of § 301 jurisdiction, the non-union employees cite *Kunz v. U.F.C.W. Local 876*, 5 F.3d 1006, 1009 (6th Cir. 1993), in which this court held that "[a]n employment contract between an individual and a labor

organization does not fall within the jurisdiction of § 301." In that case, the union fired one of its own employees who later sued the union, alleging breach of the union's duty of fair representation and breach of its contractual obligations. Because the employee was not a member of the collective bargaining unit and, therefore, had no contract with the union, this court denied § 301 jurisdiction. Although the non-member employees in this case were not employees of the union, the fact that they lacked a contract with the union positions this case outside the jurisdictional reach of § 301.

3. *Federal Arbitration Act*

The union finally argues that jurisdiction is appropriate under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. Contending that the "union security" clause in the collective bargaining agreement is sufficient authority for compulsory arbitration because the arbitration procedure "emanates" from the agreement, the union asserts the "[i]t is unnecessary for the Objectors to be signatory to an individual agreement to arbitrate."

The union's argument overlooks the language of 9 U.S.C. §§ 2 and 9, which require the existence of a written agreement to arbitrate and to enforce a final judgment before the federal courts will confirm an arbitration award. 9 U.S.C. § 2 states that

> [a] *written* provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such a contract . . . shall be valid, irrevocable and enforceable. . . (emphasis added).

In § 9, the Federal Arbitration Act specifies that

> [i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the

court so specified for an order confirming the award

. . . .

Because none of the three defendants signed an agreement to arbitrate and to be bound by judgment of the court after arbitration, as is required for jurisdiction under the Federal Arbitration Act, the union's third justification for subject matter jurisdiction likewise fails.

We live in a world in which many forms of alternative dispute resolution are being developed and widely touted, both on the basis of cost-efficiency and on the basis of "customer satisfaction." It cannot be denied that binding arbitration would offer a reasonable mechanism for settling the service-fee dispute in this case. Unfortunately, not all the disputants have agreed to undergo arbitration, and we are unable to find any legal basis to require them to do so in the absence of an agreement. Hence, we conclude, as did the district court, that this action must be dismissed for lack of subject matter jurisdiction. We therefore AFFIRM the order of the district court granting summary judgment in favor of the defendants.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DISTRICT

(Filed January 13, 1993)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 951,
Plaintiff,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Defendants.

Case No. 1:91-CV-623

HON. GORDON J. QUIST

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 951,
Plaintiff,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Defendants.

Case No. 1:92-CV-653

HON. GORDON J. QUIST

JUDGMENT

For the reasons stated in the Opinion entered this date, defendants' motions for summary judgment are GRANTED and plaintiff's requests for judgment to confirm the arbitration awards of July 17, 1990, and October 2, 1991, are DENIED.

Dated: January 12, 1993

/s/ GORDON J. QUIST
United States District Court Judge

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DISTRICT

(Filed January 13, 1993)

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UNITED FOOD AND COMMERCIAL
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Case No. 1:92-CV-653

HON. GORDON J. QUIST

OPINION

In *Communication Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641 (1988), the Supreme Court said that Section 8(a)(3) of the Labor Management Relations Act, 29 U.S.C. §158(a)(3) permits an employer and union to enter into an agreement requiring all employees to become union members as a condition of continued employment, "but the 'membership' that may be so required has been 'whittled down to its financial core.' " *Id.* at 745, 108 S.Ct. at 2648. The issue presented in *Beck* was "whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Id.* The Court held that it did not: "We conclude that §8(a)(3) ... authorizes the execution of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues.' " *Id.* at 762-763, 108 S.Ct. at 2657 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892 (1984)).

The Supreme Court has not yet addressed, however, the mechanism that a private-sector union must institute to comply with the obligation not to charge nonmembers for activities unrelated to dealing with the employer on labor management issues. Neither has it addressed the narrow question presented in the instant case: whether this Court can enforce the results of an arbitration which, pursuant to a union's internal procedure, decided disputes over charges to nonmembers.

In these consolidated cases, plaintiff United Food and Commercial Workers Local 951 (the "Union") is the sole and exclusive bargaining agent for Meijer, Inc. The defendants are three employees of Meijer, Inc., who are members of the collective bargaining unit but are no longer members of the Union. At the time defendants tendered their resignation from the Union, each of them notified the Union that he objected to paying any amount of service fees not related to collective bargaining, grievance administration, or contract administration.

The Union had instituted a Service Fee Rebate Procedure (Procedure) which provides a mechanism whereby nonmembers can challenge the Union's calculation of the reduced service fee. The Procedure requires that nonmembers file written objections which are consolidated for appeal to the Local Union Executive Board. Objections to the decision of the Board are referred to the American Arbitration Association (AAA) for decision by an impartial arbitrator selected by the AAA. The Procedure does not state that the decision of the arbitrator will be final and binding on the parties or that judgment may be entered on the arbitral award. The Procedure provides that objecting nonmembers must exhaust the remedies provided in the Procedure "prior to seeking judicial review of any issues capable of resolution under this procedure." Service Fee Rebate Procedure §VI.

In 1990 and again in 1991, the Union referred defendants' objections to arbitration. Each time, the arbitrator denied the objections and awarded the disputed services fees to the Union. The Union brought its first action to enforce the arbitration

award following the 1990 arbitration and brought the second action following the 1991 arbitration. In the first action, Case No. 1:91-CV-623, both parties filed motions for summary judgment on the issue of whether this Court should confirm the arbitration award. In addition, the National Labor Relations Board (NLRB) petitioned for intervention and a stay and was allowed to intervene. The cross-motions were referred to Magistrate Judge Joseph G. Scoville for his recommendation.

Magistrate's Report and Recommendation

Following briefing and oral argument, Magistrate Judge Scoville issued a Report and Recommendation on October 1, 1992, recommending that summary judgment be granted to defendants. The Magistrate Judge found that the Court did not have jurisdiction to enforce the arbitration and reasoned that the arbitration could not be enforced because defendants had not agreed in writing to arbitration and to the entry of judgment on the arbitration decision. The Recommendation was based on the principle that arbitration is a matter of consent that cannot be imposed on a party against his or her will.

The Union filed objections to the Report and Recommendation. On dispositive motions, the district court makes a *de novo* determination of the portions of the magistrate's report and recommendation against which objections have been properly raised. Fed. R. Civ. P. 72(b).

Following oral argument on the objections, the parties agreed to consolidate Case No. 1:91-CV-623 and Case No. 1:92-CV-653 for purposes of this Court's decision as to the issues raised by the pending cross-

motions for summary judgment in Case No. 1:91-CV-623. The parties also agreed that all pleadings filed in connection with Case No. 1:91-CV-623 should be deemed to have been filed in Case No. 1:92-CV-653. This Court has issued an Order consolidating the cases.

Union's Objections

The claim on which all of plaintiff's substantive objections rest is that the arbitration clause in its Service Fee Rebate Procedure is valid and enforceable without the express consent of the defendants. The Union has raised the following specific objections to the Magistrate Judge's Report and Recommendation:

1.a. The Union objects to the characterization of the Collective Bargaining Agreement and the Service Fee Rebate Procedure in the findings of fact, (¶¶ 5 and 6), and requested that the text be quoted rather than characterized. (*See Plaintiff's Notice of Appeal/Objections* at 4-5).

1.b. The Union objects that paragraph 9 of the finding of facts implies that "a writing containing a written provision to settle by arbitration any controversy with Local 951 concerning service fees" is requisite to confirmation of the award and requests that the paragraph be modified to reflect the fact that the document that constitutes Local 951's internal mechanism for resolving fee disputes does not provide for fee-payers to be signatories. (*See Plaintiff's Notice of Appeal/Objections* at 4-5).

2. The Union objects that the Magistrate erred in finding no jurisdiction under Section 301 of the Labor Management Act, 29 U.S.C. §185 and in requiring an agreement between the objecting fee

payers and the Union as a prerequisite to arbitration. It argues that the duty of fair representation (1) serves as the governing standard for the legal sufficiency of a service fee rebate procedure; (2) derives from the Union's obligation to represent all bargaining unit members; and thus (3) emanates from the Union security provisions which are contained in the collective bargaining agreement between the Union and the employer, to which the employees are, appropriately, not signatories. Jurisdiction thus derives "from the very nature of the Union security clause, the duty of fair representation, and the judicially imposed mandate to exhaust internal union remedies." *Plaintiff's Notice of Appeal/Objections* at 9. Moreover, the duty of fair representation does not require that nonmembers be a signatory to the Procedure for determining the service fee and it is acceptable to include in that Procedure arbitration of the amount of rebate. (*See Plaintiff's Notice of Appeal/Objections* at 6-15).

3. & 4. The Union objects that the Magistrate misapplied the Federal Arbitration Act, 9 U.S.C. §1-14, and erred in declining to confirm the arbitration award for the same reason it states in its second objection—that defendants are not, in the scheme of things, contemplated as signatories on the collective bargaining agreement and that the Union has the power, under the collective bargaining agreement, to determine the procedure for resolving rebates. Thus, it claims, an arbitration was appropriate and its confirmation *pro forma*. (*See Plaintiff's Notice of Appeal/Objections* at 15-20).

Decision

Findings of Fact

Plaintiff's objections to the findings of fact are insubstantial. The Magistrate's characterization of plaintiff's Collective Bargaining Agreement and Service Fee Rebate Procedure in paragraphs 5 and 6 of the findings of fact are accurate summaries of those documents. Paragraph 9 is a straightforward recitation of an undisputed fact that does not contain the implication plaintiff ascribes to it.

Section 301 Jurisdiction

The Magistrate Judge correctly determined that this Court does not have jurisdiction over the Union's actions to enforce the arbitration awards pursuant to Section 301 of the Labor Management Act, 29 U.S.C. §185. The language of the Act does not provide for federal court jurisdiction over a case brought by a union against individual employees. 29 U.S.C. §185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In oral argument, plaintiff claimed that the "penumbra" of Section 301 conferred jurisdiction. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 199, 83 S.Ct. 267, 269 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 915

(1957). Plaintiff did not, however, point to any decisions that included within the penumbra jurisdiction a case in which a union sued individual employees. To the contrary, in such cases, the courts have determined that Section 301 does not provide jurisdiction. *See Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401, 407, 101 S.Ct. 1836, 1840 (1981) (Section 301 shields employees from suits for damages); *Building Material & Dump Truck Drivers v. Traweek,* 867 F.2d 500, 507-508 (9th Cir. 1989).

The Union asserted in its brief and oral argument that the instant actions are not adversarial against defendants but instead merely seek confirmation that its Procedure is acceptable. Plaintiff did not, however, bring an action for a declaratory judgment on the acceptability of its Procedure. Instead, it has asked for enforcement of an arbitration award against defendants and, by doing so, presented the Court with an adversarial procedure over which it lacks jurisdiction.

Jurisdiction is also not bestowed by the fact that the cases involve arbitration. While the Supreme Court established that the district courts have jurisdiction to specifically enforce arbitration clauses found in collective bargaining agreements, *see Textile Workers Union v. Lincoln Mills,* 353 U.S. at 458, 77 S.Ct. at 919, any duty to arbitrate derives from a contractual agreement of the parties to the arbitration. In *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 648-649, 106 S.Ct. 1415, 1418 (1986), the Supreme Court said:

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." . . . This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.

The Supreme Court recently reiterated this principle in a NLRB case, stating that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Litton Financial Printing v. N.L.R.B.*, _____ U.S. _____, 111 S.Ct. 2215, 2222 (1991).

The arbitrations at issue did not arise from a collective bargaining agreement or any other agreement between plaintiff and defendants but rather from the internal Union Procedure. The internal Procedure was unilaterally instituted by the Union and was not the subject of an agreement between the Union and the employees. Thus, the Procedure did not contemplate or include an agreement by defendants to arbitrate their disputes with the Union. Absent such an agreement, the arbitrators' judgments cannot be enforced by this Court.

Federal Arbitration Act

The lack of consent to arbitration also prevents plaintiff from obtaining enforcement of the arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§1-14. The Act applies only to written agreements to submit controversies to arbitration (9 U.S.C. §2) and requires that there be written consent to entry of judgment on an arbitration decision (9

U.S.C. §9) before a decision can be enforced. The law on this point is well-settled in the Sixth Circuit. In *Roney and Company v. Kassab,* _____ F.2d _____ (6th Cir. 1992) (1992 WL 364092), the Court said:

> "[W]e have recognized that the FAA (Federal Arbitration Act) does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

1992 WL 364092 at 2* (quoting *Wiepking v. Prudential-Bache Securities, Inc.,* 940 F.2d 996, 998 (6th Cir. 1991)).

The requirement of Section 9, that the parties consent to entry of judgment, bars the relief the Union requests even in the case of Mr. Bucks, who arguably agreed in writing to participate in the first arbitration. *See* Magistrate's Report and Recommendation at 19-24.

Fulfillment of Duty

Finally, the Union's argument that it has fulfilled its obligation to defendants by establishing its Internal Procedure, and that defendants are thus bound by the arbitration included within the Procedure despite their lack of consent, mischaracterizes the issue before the Court, which is whether a federal court can put its *imprimatur* on the arbitration awards.

It is an open question whether, in implementing *Beck,* strictures will be placed on private-sector unions like those placed on public-sector unions. *See*

Chicago Teachers Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066 (1986) (procedures for determining the amount to be paid by nonmembers of public-sector unions must include safeguards insuring that dissenters' funds are not used for improper purpose, provision of adequate information to nonmembers on the basis for the proportionate share, and procedures for "a reasonably prompt decision by an impartial decisionmaker; *Hohe v. Casey,* 956 F.2d 399, 408-409 (3rd Cir. 1992) (public-sector union cannot require arbitration as prerequisite to 1983 action); *Tierney v. City of Toledo,* 917 F.2d 927, 940 (6th Cir. 1990) (public-sector union cannot require exhaustion of internal remedies prior to 1983 action). The Supreme Court based its decision in *Beck* on an interpretation of Section 8(a)(3) of the National Labor Relations Act, the statute permitting union security agreement. 29 U.S.C. §158(a)(3). It did not address whether NLRA union security agreements implicate constitutional rights or involve state action.

Price v. International Union, UAW, 927 F.2d 88 (2d Cir. 1991), is the only post-*Beck* decision which has, as yet, addressed the issue of NLRA union procedures for determining "financial core" payments. *Price* was initiated by employees who sought, *inter alia,* a declaratory judgment that the Union's post-*Beck* procedures were constitutionally and legally improper. The Court of Appeals for the Second Circuit determined that, while state action is present in public-sector unions, state action is not involved in NLRA union security agreements "and there are thus no constitutional concerns which warrant the safeguards found necessary in *Hudson.*" 927 F.2d 88, 92 (1991). The court held that, with respect to the internal procedure a private-sector

union institutes to handle disputes over nonmembers' fees, "it is necessary only that the procedures employed not be arbitrary, discriminatory, or implemented in bad faith." *Id.* The court in *Price* concluded by approving procedures similar to those adopted by plaintiff, which included an arbitration in which an arbitrator was selected by AAA procedures. *Id.*

Commentators who have considered whether the *Hudson* procedures should apply to private-sector unions and whether state action is present in union security agreement disputes under the NLRA have disagreed. *See* Kenneth G. Dau-Schmidt, *Union Security Agreements Under The National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck.*" 27 Harv. J. on Legis. 51 (1990); Elena Matis, *Procedural Rights of Fair Share Objectors After Hudson and Beck,* 6 Lab. Lawyer 251 (1990); David H. Topol, *Union Shops, State Action, and the National Labor Relations Act,* 101 Yale L.J. 1135 (1992).

The instant case does not require or permit assessment of the Union's internal Procedure for determining "financial core" payments. Unlike *Price,* it is not an action for a declaratory judgment. Whether or not NLRA union security agreements are to be treated like those in public-sector unions, and whether or not the Union can require exhaustion of its internal Procedure, this Court does not have jurisdiction under any applicable statute to enforce the arbitration at issue here.

Conclusion

Plaintiff's objections are overruled and the Magistrate Judge's Report and Recommendation is **APPROVED** and **ADOPTED** by this Court.

Defendants' motions for summary judgment are **GRANTED** in Case No. 1:91-CV-623 and Case No. 1:92-CV-653. A Judgment refusing to confirm the arbitration awards of July 17, 1990, and October 2, 1991, will be entered in accordance with this Opinion.

Dated: January 12, 1993

/s/ GORDON J. QUIST
United States District
Court Judge

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE JOSEPH G. SCOVILLE

(Filed October 5, 1992)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 951,
Plaintiff,

vs.

PHILLIP MULDER, et al.,
Defendants.

Case No. 1:91cv 623

Honorable Gordon J. Quist

REPORT AND RECOMMENDATION

This is a federal question case. Plaintiff is a labor union that has a collective bargaining agreement with Meijer, Inc. Defendants are three individual workers who are employed at Meijer, Inc. but are not members of the plaintiff Union. Because they are employed in the bargaining unit for which the plaintiff Union is the exclusive representative, defendants are required as a condition of their employment to pay the Union a service fee to defray the costs of collective bargaining, contract administration, and related activities. Defendants protested the calculation of the service fee, contending the fee exceeded that allowable under

the Supreme Court's decision in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). Acting pursuant to a procedure that it had previously adopted, the Union submitted defendants' protests to the American Arbitration Association for resolution. Defendant Buck appeared at the hearing; the other defendants did not. The arbitrator found in favor of the Union by award dated July 27, 1990.

On July 24, 1991, the Union sued in this court to confirm the award. The Union's complaint relies for jurisdictional purposes on section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and the Federal Arbitration Act, 9 U.S.C. §§1-14. Defendants have filed a motion for summary judgment. Defendants argue that they never agreed in writing to submit any dispute with the Union to arbitration and that the court therefore has no authority to issue a judgment confirming the results of the Union's process. Plaintiff Union has filed a cross-motion for summary judgment, asserting that consent is not necessary and that the decision of the arbitrator should be confirmed as a matter of law. The parties have filed numerous briefs addressed to this issue, and the matter is now before the court for decision.[1] For the reasons set forth below, I conclude that the award is not entitled to confirmation under any statute relied upon by the Union and that defendants' motion for summary judgment should be granted.

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[1] The National Labor Relations Board has been allowed to intervene in this action. In an unfair labor practice complaint, the Board has charged that the procedure adopted by the plaintiff Union violates the National Labor Relations Act in specified ways. The charges pending before the Board have no direct bearing upon the outcome of the cross-motions for summary judgment.

Proposed Findings of Undisputed Facts

In their cross-motions for summary judgment, the parties do not dispute the following facts:

1. Plaintiff, Local 951 of the United Food & Commercial Workers Union, is a labor union with principal offices located in Grand Rapids, Michigan.

2. Meijer, Inc. is a corporation located in Walker, Michigan, with facilities throughout the State and is engaged in an industry affecting interstate commerce.

3. Local 951 and Meijer, Inc. signed a collective bargaining agreement covering the period November 29, 1987, through September 21, 1991. The collective bargaining agreement (CBA) recognizes Local 951 as the sole and exclusive collective bargaining agent with respect to the conditions of employment for certain employees of Meijer, Inc. working at the company's distribution center.

4. At the time relevant to the complaint, defendants Phillip Mulder, Charles Buck, and Leon Gibbons were employed by Meijer, Inc. at its distribution center and were included in the bargaining unit governed by the CBA. Defendants were formerly members of Local 951, but each has resigned. Defendant Mulder resigned in October of 1988; defendant Buck resigned in March of 1989; and defendant Gibbons resigned in November of 1989. Consequently, at the time relevant to the complaint, defendants were members of the collective bargaining unit but not members of the Union.

5. The CBA contains a union security provision commonly known as a "union shop" clause (CBA, art. 3). Under the union shop clause, employees are required to be members in good standing of Local 951

as a continuing condition of their employment. However, pursuant to the requirements of the National Labor Relations Act discussed below, the CBA defines union membership in good standing as requiring only monetary support of the union. Consequently, bargaining unit members who do not wish to be formal members of the union may retain their jobs by paying a service fee, in lieu of dues, designed to defray the costs of the union's collective bargaining, grievance adjustment, and contract administration activities.

6. At the time that they tendered their resignation from Local 951, defendants notified the Union that they objected to paying any amount of service fees not related to collective bargaining, grievance administration, or contract administration (hereafter collectively referred to as "contract administration services"). Local 951 has established a service fee rebate procedure ("Procedure") whereby nonunion members employed in the bargaining unit may object to payment for union services other than contract administration services (see Procedure, attached to Complaint as Ex. B). The Procedure provided a mechanism by which nonunion members could challenge Local 951's calculation of the reduced service fee. The Procedure provided for the filing of a written objection to the Union, followed by an appeal to the Union's executive committee and ultimate referral to the American Arbitration Association. The Procedure contemplates the consolidation of all objections in a single hearing before an arbitrator appointed by the American Arbitration Association. The Procedure does not state that the decision of the arbitrator will be final and binding on the parties, nor does it provide that judgment may be entered on the

arbitral award. The Procedure merely states that the objecting nonmember must exhaust the remedies set forth therein before seeking judicial review (Ex. B to Complaint, ¶VI).

7. Local 951 calculated its 1989 service fee to be 8.47% less than the full union dues, the difference allegedly representing the cost of services not connected with contract administration. The Union calculated its 1990 service fees to be 9.46% less than full union dues. Rebates were offered to defendants in these amounts. Defendants objected to the calculation of fees. Pursuant to the fee rebate procedure, the matter was referred to the American Arbitration Association, which appointed George T. Roummel as arbitrator. A hearing was conducted on July 17, 1990, by Mr. Roummel. Defendants were given notice of the hearing. Defendant Buck appeared at the hearing, but the other defendants did not. The written objections of defendants Mulder and Gibbons were nevertheless presented to Mr. Roummel.

8. On July 27, 1990, Mr. Roummel issued an award, a copy of which is attached to the complaint as Exhibit D. The award upheld Local 951's calculation of the nonmember service fee.

9. None of the defendants ever signed an agreement in writing containing a written provision to settle by arbitration any controversy with Local 951 concerning service fees. However, in February of 1990, after the present dispute arose, defendant Buck wrote to the Union stating:

> I objected last year and I'm still objecting—the union deserves $5.00 per month and nothing more from me! Let's get to arbitration on this!!

(Ex. 2, attached to plaintiff's Reply Brief, docket # 28). Furthermore, in his objection to the 1990 service fees, defendant Buck stated, "On the above points I do again ask for arbitration." (Objection, received March 21, 1990).

10. All three defendants have filed unfair labor practice charges with the National Labor Relations Board protesting various aspects of Local 951's assessment of service fees against nonmembers and the Procedure implemented to resolve service fee disputes. In a consolidated complaint issued May 31, 1991, the Regional Director, Seventh Region, of the National Labor Relations Board alleged that Local 951 violated section 8(b) of the National Labor Relations Act in connection with the assessment of service fees against defendants. That complaint remains pending.

Statement Of Issue

The sole issue presently before the court is whether the plaintiff Union is entitled to the entry of judgment against defendants confirming the arbitral award.

Discussion

I.

An understanding of the issue presented in this case requires some review of the labor law background from which the case arises. This background, although not dispositive of the narrow issues presently before the court, serves to explain how the parties reached their present dispute.

This dispute arises in the context of a so-called union security clause in a collective bargaining agreement. The question of union security has raised major issues in this nation's labor law as it has evolved in the Twentieth Century. The passage of the Wagner Act in 1935 dispelled any previous doubt concerning the right of employees to form a union and to engage in collective bargaining. Moreover, in a proviso to section 8(3), the Wagner Act permitted union security arrangements to strengthen the position of accredited unions. Under the proviso to section 8(3), both closed shops (where employment was open only to preexisting union members) and union shops (where employees merely were required to join the union after they were hired) were allowed. *See NLRB v. General Motors Corp.*, 373 U.S. 734, 739-40 (1963).

The Taft Hartley Amendments of 1947 somewhat weakened the status of union security agreements. The 1947 Act amended section 7 of the Wagner Act to guarantee for the first time an employee's right to *refrain* from union membership and activity. Former section 8(3) was modified by new section 8(a)(3), which outlawed the closed shop, while permitting a modified form of union shop under which the concept of union membership was "whittled down to its financial core." *General Motors Corp.*, 373 U.S. at 742. Under amended section 8(a)(3), 29 U.S.C. §158(a)(3), an employer and a union may include in their collective bargaining agreements a union security arrangement under which employees are required, as a condition of employment, to obtain and maintain membership in a union, but the employee may be discharged only when loss of union membership results from the employee's failure to pay dues and initiation fees. The effect of

these limitations on union shop provisions has been to "prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954).

Consequently, as a result of the Taft Hartley Amendments, unwilling employees could no longer be forced into full union membership. Rather, the compulsory "membership" allowed by amended section 8(a)(3) is the practical equivalent of an agency-shop arrangement, where support of the union is strictly monetary. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 217 n.10 (1977). As explained by the Supreme Court, the impetus for the amendments was to eliminate the evils of the closed shop while still protecting unions from the problem posed by "free riders," those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden. *General Motors Corp.*, 373 U.S at 740-43. Congress believed that in the absence of some union security arrangement, free riders would have a strong incentive to escape their responsibility for paying a "fair share" of the collective bargaining expenses incurred by the union for the benefit of all employees. *Id.* at 740-41.

Beginning in the 1950's, the constitutionality of such union security arrangements came under attack by public sector employees. In *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court was faced with challenges to the agency-shop provisions of the Railway Labor Act, which were patterned after section 8(a)(3) of the National Labor Relations Act.

The Court avoided passing upon the constitutionality of statutorily mandated agency-shop clauses by construing the federal statute to require that nonmembers of the union pay only dues designed to defray the union's costs in negotiating and administering the collective bargaining agreement and adjusting grievances. In both cases, the court reiterated the serious problem posed by free riders and found that the statutes creating the agency shops intended only to impose upon nonmembers the duty of paying service fees connected with collective bargaining activities.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court squarely faced the question whether public sector agency-shop arrangements violate the constitutional rights of government employees who object to various union activities financed by their compulsory service fees. Relying upon *Hanson* and *Street*, the Court reaffirmed the principle that union security clauses are valid insofar as they impose service charges used to finance the union's collective bargaining and contract administration activities. 431 U.S. at 225-26. The Court held, however, that the First Amendment guarantee of freedom of association and expression prohibits public employers and unions from requiring employees to contribute to the support of ideological causes that they may oppose, as a condition of holding a job in the public sector. *Id.* at 232-37. *Abood* therefore recognized the First Amendment right of nonunion employees to prevent the union from spending a part of the required service fees to support political candidates or to express political views "unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court considered whether and to what extent procedural safeguards are necessary to protect the rights of nonunion public sector employees under *Abood*. In *Abood*, the court had indicated that public sector unions acting under an agency-shop arrangement must "devise a way of preventing compulsory subsidization of ideological activities by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237. In *Hudson*, the Court reiterated that agency-shop agreements can infringe First Amendment rights and underscored the necessity of procedural safeguards "to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12. The Court proceeded to delineate the minimum safeguards necessary to protect the First Amendment rights of objecting nonmembers, including the requirement that the union provide a prompt "internal remedy" under which the objecting nonmember could have an expeditious, fair, and objective review of the service fee before an impartial decision maker. 475 U.S. at 307-08.

Hence, by 1986, the Supreme Court had established significant constitutional limitations, arising from the First Amendment, upon union security arrangements in the public sector. First, an unwilling nonmember could be compelled only to support the union monetarily. Second, nonmembers could be compelled to support only contract administration services and not political or ideological causes. Third, the union was required to institute certain procedural safeguards, including a prompt

internal remedy before an impartial decision maker, to ensure that the service fee imposed upon nonmembers covered only contract administration services and not political or ideological activities. Although union security arrangements had their genesis in private sector labor law, by 1986, the Supreme Court had not yet addressed many of these issues as they related to union security arrangements in the private sector.

The Court reached some of these issues in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). The plaintiffs in *Beck* were nonunion members covered by a union security clause in a collective bargaining agreement between their employer and the Communication Workers of America. Under that clause, represented employees who did not wish to become union members were nevertheless required to pay service fees in amounts equal to the dues paid by union members. Plaintiffs sued in federal court, alleging that a portion of the service fee was expended by the union for lobbying and other political activity. Plaintiffs alleged that such expenditures violated the First Amendment, as well as section 8(a)(3) of the National Labor Relations Act and the union's duty of fair representation. The district court concluded tht the union's collection of agency fees for purposes other than contract administration and collective bargaining activities violated the associational and free speech rights of objecting members. On appeal, the Fourth Circuit affirmed the result, but rested its judgment on the union's violation of its duty of fair representation.

On *certiorari*, the Supreme Court affirmed. It first analyzed the history of section 8(a)(3) of the National Labor Relations Act, and especially those provisions

enacted as part of the Taft Hartley Amendments. The *Beck* Court reaffirmed the concept that section 8(a)(3) limited union security arrangements to financial support of the union. 487 U.S. at 744-45. Relying on *Street, Hanson,* and other analogous precedents under the Railway Labor Act, the Court went on to hold that section 8(a)(3) of the National Labor Relations Act forbids a union, over the objections of dues-paying nonmember employees, to expend funds collected from them on activities unrelated to contract administration or collective bargaining. *Id.* at 474-62. The Court therefore upheld the Fourth Circuit's determination that the union's collection of service fees for purposes other than contract administration services violated the union's judicially implied duty of fair representation, as enunciated in *Vaca v. Sipes,* 386 U.S. 171 (1967).[2]

Beck, therefore, is analogous in effect to *Abood.* In *Abood,* the Supreme Court held that the First Amendment prevents unions from collecting service fees from unwilling nonmembers in the public sector in excess of that necessary to finance contract administration services. In *Beck,* the Court applied

[2] Although the federal labor statutes do not expressly impose a duty of fair representation upon unions, the Court in *Vaca v. Sipes* implied such a duty as a corollary to the union's status as exclusive bargaining agent. The *Vaca* Court held that "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." 386 U.S. at 177. *Beck* determined that exaction of service fees for reasons unrelated to collective bargaining and contract administration violates this implied duty. The Court did not reach the question of the effect, if any, of the First Amendment. 487 U.S. at 761-62.

the duty of fair representation to reach the same result in the private sector. The Court has not yet had occasion to address in a private sector case the issue decided by *Hudson* in the public sector context: whether and to what extent procedural safeguards are required of a union to protect nonmembers from the involuntary support of political activities by the union.

The foregoing recitation of the labor law background to this dispute should make clear the issues not involved in the present case. First, this case does not present the propriety of union shop agreements, such as the one contained in Article 3 of the CBA, requiring monetary support of the union by nonmembers. Such arrangements have been allowed since the enactment of the Wagner Act and are expressly sanctioned by section 8(a)(3). Second, the right of a nonmember to protest the use of service fees for union activities not related to contract administration services is no longer at issue: the *Beck* Court determined this question for private sector employees such as defendants. Finally, this case does not involve the question whether a union such as plaintiff may establish an internal procedure that objecting nonmembers can invoke for a review of the propriety of service fees. Although the Supreme Court has not addressed this issue in the private sector, it appears virtually certain that the Court would follow its public sector decision in *Hudson*, at least by analogy, and impose some procedural requirement upon private sector unions as an aspect of their implied duty of fair representation. *See Price v. UAW*, 927 F.2d 88 (2d Cir.) (private sector union not required to provide full *Hudson* procedures), *cert. denied*, 112 S.Ct. 295 (1991). The only issue presented by this case

is whether the plaintiff union, operating under the agreements presently before the court, is entitled to confirmation of the results of its internal remedy by a judgment of this court. For the reasons set forth below, I recommend that this question be answered in the negative.

II.

Plaintiff relies upon two federal statutes as alternative authority for its request for a judgment confirming the award (Complaint, ¶1). The first is section 301 of the Labor Management Relations Act, 29 U.S.C. §185. The second is the Federal Arbitration Act, 9 U.S.C. §§1-14. As is shown below, neither statute provides grounds for the relief that plaintiff seeks, as both require the existence of a valid written agreement to submit a claim to arbitration.

Section 301(a) of the Labor Management Relations Act provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a). In the landmark case of *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 485 (1957), the Supreme Court established that the district courts have jurisdiction under section 301 to specifically enforce arbitration clauses found in collective bargaining agreements between an employer and a labor union. *Lincoln Mills* directs the federal courts to fashion federal common law under

section 301 to decide questions concerning the enforceability of arbitration clauses. 348 U.S. at 456-57. Under the common law fashioned by the Supreme Court in the thirty-five years since *Lincoln Mills,* it is now axiomatic that arbitration is a matter of contract and that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). Hence, the duty to arbitrate never arises as a matter of law but only as a consequence of an express agreement to arbitrate. *See Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 374 (1974). As recently as last year, the Supreme Court reiterated that arbitration under the National Labor Relations Act is a matter of consent and cannot be imposed upon a party against his or her will. *Litton Financial Printing Div. v. NLRB,* _____ U.S. _____, 111 S. Ct. 2215, 2222-24(1991).The question whether the parties have agreed to arbitrate is one for the court, not the arbitrator. *See AT&T Technologies, Inc. v. Communication Workers of America,* 475 U.S 643, 649 (1986); *Teamsters v. Pepsi-Cola Gen. Bottlers, Inc.,* 958 F.2d 1331, 1333 (6th Cir. 1992).

Plaintiff's assertion of jurisdiction under section 301 is plainly meritless, for want of the fundamental requisites under the statute. First, by the Act's own terms, "a suit properly brought under §301 must be a suit either for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce or for violation of a contract between such labor organizations." *Wooddell v. Electrical Workers,* 112 S. Ct. 494, 498 (1991). This suit is neither. Plaintiff Union cannot point to any collective bargaining

agreement or agreement between unions in which *defendants* agreed to arbitrate disputes with the Union. The arbitration clause of the CBA does not supply the crucial missing element. That clause (Article 5) creates an arbitral remedy only for grievances against the employer arising under the contract: "The authority of the arbitrator and the Adjustment Board shall be limited to the consideration of unresolved grievances timely raised under this agreement." (CBA, art. 5.2). The arbitration presided over by Mr. Roummel was plainly not pursuant to the CBA, but was under the union's separate and distinct Procedure. Article 5 of the CBA simply does not apply to disputes between the union and nonmembers over service fees, and this case is not a suit under the collective bargaining agreement. Hence, the Union's claim under section 301 fails for want of an agreement by defendants to arbitrate claims against the Union.

Second, it is now settled that section 301 does not create jurisdiction for suits by unions against employees. Section 301 expressly contemplates suits between unions and employers for breach of a collective bargaining agreement. *See United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 622 (1981). Likewise, an employee can sue an employer under section 301 for a violation of the collective bargaining agreement, under a third-party beneficiary theory. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Further, a union constitution is a "contract" within the meaning of section 301, which provides jurisdiction for an inter-union suit by an international against a local to enforce the

constitution. *See United Ass'n of Journeymen*, 452 U.S. at 620. Consequently, a union member may sue the union under section 301 to enforce the union constitution. *Wooddell*, 112 S. Ct. at 500. The Supreme Court has held, however, that Congress intended individual employees to be shielded from suits brought under section 301. In *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981), the Court construed the language and legislative history of section 301 as prohibiting an employer from suing individual union members under section 301 for damages. Relying upon *Reis*, the Ninth Circuit has squarely held that section 301 does not create jurisdiction for suits brought by the union against individual employees. *Building Material & Dump Truck Drivers v. Traweek*, 867 F. 2d 500, 507-508 (9th Cir. 1989). At oral argument, I inquired whether plaintiff's counsel could cite a single case supporting the exercise of jurisdiction under section 301 in a suit between the union and a nonmember employee who was not a party to the collective bargaining agreement. Plaintiff's counsel conceded that no such case exists.

Plaintiff asserts, without authority, that this is a suit to "enforce" the union security provision in Article 3 of the CBA. The CBA, however, is not an agreement between the union and nonmembers. Rather, it is an agreement between the union and Meijer, Inc. The union security arrangement in the CBA does not directly obligate any employee to pay service fees. Rather, it is a promise by Meijer to fire employees who are not current in the payment of their dues or service fees. This is clearly an action to enforce the Union's own self-promulgated Procedure, not a

suit for violation of the CBA. Plaintiff Union has failed to cite to this court a single case in which section 301 has been found to support jurisdiction for a suit by a labor union against a nonmember to enforce a union's internal remedy.

In summary, I conclude that section 301 of the Labor Management Relations Act provides no authority for the maintenance of this action, as defendants never agreed in a collective bargaining agreement to arbitrate disputes with the Union. All defendants are entitled to summary judgment on plaintiff's claim under section 301.

III.

Plaintiff's alternative ground for relief is the Federal Arbitration Act, 9 U.S.C. §§1-14. Congress passed the Arbitration Act to reverse longstanding judicial hostility towards arbitration agreements and to place them "upon the same footing as other contracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). By its express terms, the Act applies only to "written" arbitration provisions in contracts, or agreements "in writing" to submit an existing controversy to arbitration. 9 U.S.C. §2. Hence, the first task of a court asked to compel arbitration under the Act "is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The Act covers collective bargaining agreements and other written contracts involving interstate commerce. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Inexplicably, plaintiff argues with great force that defendants' consent "is not a prerequisite for the relief requested" in plaintiff's complaint (Brief, docket #28, p. 4), that defendants' agreement to arbitration is "unnecessary" (*Id.* at 8), and that the Union "is not required to produce an agreement, written or otherwise, between itself and the Objectors concerning the arbitration process for service fees" (*Id.*). Plaintiff cites no authority under the Arbitration Act to support this naked *ipse dixit*. The plain language of the Arbitration Act expressly requires a written contract to arbitrate. 9 U.S.C. §§2, 3, 4. The Supreme Court has reiterated on countless occasions that arbitration is merely a matter of agreement, *see, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985), and that the courts may enforce arbitration only to the extent agreed upon by the parties. *See Volt Information Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 474-75 (1989); *Warrior & Gulf*, 363 U.S. at 582 ("A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

Consequently, I categorically reject plaintiff's central position and conclude that a necessary prerequisite to relief under the Arbitration Act is the existence of a written agreement to arbitrate. In the case of defendants Mulder and Gibbons, the Union has not produced a scintilla of evidence to support the existence of an agreement by them to arbitrate any dispute with the union. They are therefore entitled to summary judgment. In an effort to avoid this result, the Union argues that defendants have waived their right to challenge the arbitration award by their failure to file a timely motion to vacate the award.

This is circular reasoning. A *party* to an arbitration agreement must move in a timely fashion to vacate the award, on pain of waiving judicial review of the substance of the award. *See Occidental Chemical Corp. v. Int'l Chemical Workers Union,* 691 F. Supp. 1049 (W.D. Mich. 1987), *aff'd,* 853 F.2d 1310 (6th Cir. 1988). This is because the parties have agreed to submit the substance of their dispute to the arbitrator. The threshold question, however, of the very existence of an agreement to arbitrate is one for the court, not the arbitrator. *See AT&T,* 475 U.S. at 650; *Warrior & Gulf,* 363 U.S. at 582. Plaintiff has not cited any authority that limits the time in which a *nonparty* to an arbitration agreement may challenge a purported arbitration award entered without jurisdiction. Hence, the failure of defendants Mulder and Gibbons to challenge the award does not preclude their ability to challenge it now on the ground of the lack of consent to arbitration.

Defendant Buck presents a different situation. After the dispute with plaintiff Union arose, Mr. Buck twice asked for arbitration in writing (see Proposed Findings, No. 9), and he appeared at the arbitration hearing (*Id.,* No. 7). The Arbitration Act covers not only written agreements containing an arbitration clause, but also "an agreement in writing to submit to arbitration an existing controversy." 9 U.S.C. §2. Consequently, even in the absence of a valid arbitration clause in the underlying agreement, the parties may consent after a dispute has arisen to submit it to arbitration. *See Franklin Elec. Co. v. UAW,* 886 F.2d 188, 191 (8th Cir. 1989); *Johnson v. UFCW Local 23,* 828 F.2d F.2d 961, 964-65 (3d Cir. 1987). Thus, where a party voluntarily submits an

issue to arbitration, he cannot later argue that the arbitrator had no authority. *See Jones Dairy Farm v. UFCW Local P-1236,* 760 F.2d 173, 175-76 (7th Cir.), *cert. denied,* 474 U.S. 845 (1985).

Mr. Buck concedes asking for arbitration, but argues that his consent was induced by the fraud and undue influence of the Union, which falsely represented to him, orally and in writing, that he was required to exhaust the arbitration remedy before going to court. Fraud in the inducement of an arbitration agreement is a valid defense. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967); *see Tierney v. Toledo,* 917 F.2d 927, 940 (6th Cir. 1990) (requirement that public sector employee exhaust union remedy as prerequisite to suit invalid). Hence, the Union has raised a triable issue concerning the existence of consent to arbitration by Mr. Buck, while Mr. Buck has raised a triable issue whether the consent was voluntary.

If the existence of an agreement to arbitrate were the only relevant issue, neither party would be entitled to summary judgment with regard to the claim under the Arbitration Act against Mr. Buck. The Act, however, contains a further prerequisite to the relief that the Union seeks. In order to be entitled to a judgment confirming an arbitration award (which gives the award the effect of an order of the court), the parties must have agreed "that a judgment of the court shall be entered upon the award." 9 U.S.C. §9. In the absence of such a provision, the Arbitration Act does not authorize entry of a judgment confirming the award. *See Oklahoma City Ass'n v. Wal-Mart Stores, Inc.,* 923 F.2d 791 (10th Cir. 1991); *Varley v.*

Tarrytown Assoc., Inc., 477 F.2d 208, 210 (2d Cir. 1973). Plaintiff Union cannot point to any such agreement made by Mr. Buck.

In a series of decisions liberally construing 9 U.S.C. §9, some courts have accepted substitutes for an express agreement for the entry of judgment. Under these cases, a provision in the contract that the arbitral award shall be "final and binding" is considered tantamount to a consent to the entry of judgment. *See, e.g., Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 929-30 (11th Cir. 1990). Similarly, where the contract incorporates the rules of the American Arbitration Association ("AAA") and those rules provide for the entry of judgment, the requirement of 9 U.S.C. §9 is satisfied. *See, e.g., Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 193 (4th Cir. 1991). If the Union could point to either of these substitutes for express consent to the entry of judgment, it could defeat Mr. Buck's motion.

The Union, however, has no basis on which to rely on this line of authority. First, the Procedure adopted by the Union does not contain any words of finality, such as "the award shall be final and binding." The Procedure merely states that the arbitrator will "decide the amount of the service fee" and "determine the chargeable portion of the service fee" (Procedure, ¶IV). The Procedure does not say that the award will be final or that judgment may be entered. It says only that the nonmember must exhaust the arbitration procedure prior to seeking judicial review (*Id.*, ¶VI). Similarly, the AAA brochure attached to the Procedure contains no provision for the entry of judgment. Although the agreement for entry of

judgment may be provided by reference to AAA rules, those rules must expressly mention entry of judgment. *Varley,* 477 F.2d at 210.

In the absence of (1) an express, written consent to entry of judgment, or (2) words of finality in the contract, or (3) incorporation of AAA rules that themselves contain consent to entry of judgment, the Arbitration Act does not allow entry of judgment on an award. *Wal-Mart Stores,* 923 F.2d at 794. Significantly, the mere participation in an arbitration hearing is itself insufficient. *Id.* Consequently, I conclude that Mr. Buck is entitled to summary judgment on plaintiff's claim under the Arbitration Act, as the Union has produced no evidence of an express agreement for the entry of judgment (or its equivalent) as required by 9 U.S.C. §9.

In summary, plaintiff is required to prove a written agreement to arbitrate as a prerequisite to the entry of judgment under the Arbitration Act. Defendants Mulder and Gibbons are entitled to summary judgment on the claim against them, because the Union has no evidence of such an agreement and, in fact, virtually concedes that none exists. With regard to Mr. Buck, triable issues exist concerning the existence of a voluntary agreement to arbitrate, but there is no question that his consent, if any, did not include the required agreement for the entry of judgment. Therefore, I conclude that all defendants are entitled to a summary judgment dismissing plaintiff's request for the entry of judgment on the award under the Arbitration Act.

IV.

The Union's position in this case, reduced to its essence, is that the nonmembers' consent to arbitration is unnecessary for the entry of judgment because the *Union* is re_ired to provide an impartial mechanism for determining service fee disputes. The Union supported this position in its early filings before this court by citation to *Beck* and to analogous public-sector cases. *Beck* established only that unions could not charge nonmembers in the private sector for activities unrelated to contract administration. By analogy to *Hudson* and other public-sector cases, the Union argued (although *Beck* never addressed the question) that it was obliged to grant objecting nonmembers an internal procedure, just as a public-sector union is required to do, to resolve fee disputes. From this assumption, the Union leapt to the conclusion that the outcome of the procedure would support a judgment of the court.

In so arguing, the Union mistook *duty* for *power*. By analogy to *Hudson*, the Union has a duty to provide nonmembers with an impartial forum for resolving fee disputes. The Union has yet to point to any source of *power* to coerce nonmembers to avail themselves of such a forum if they are unwilling to do so, such that the result of the proceeding will support a judgment. Especially in the private sector, the ability of a union to force nonmembers to settle their disputes with the union by following the union's own, self-promulgated procedures is not established in law. *See Soto Segarra v. Sea-Land Service, Inc.*, 581 F.2d 291, 295 (1st Cir. 1978) (nonmember not required to exhaust internal union appeals); *Smith v. United Transp. Union*, 594 F. Supp. 96, 98 (S.D. Cal. 1984)

(striking union's affirmative defense of failure to exhaust internal procedures in suit by nonmember). Consequently, the private-sector union stands on the same footing as any other person: if it wishes to submit disputes to an arbitral forum, it must obtain the written consent of the other party.

Ultimately, the Union has been forced to abandon its weak analogy to the public-sector cases. It is now becoming clear, even in the public sector, that the "arbitration" that unions must offer to nonmembers is not the kind of process that will support a federal court judgment. In *Hudson* itself, the Supreme Court held that the result of the union's internal remedy would *not* receive preclusive effect in subsequent civil litigation under section 1983. 475 U.S. at 308 n.21. The Court, therefore, was clearly not contemplating a final and binding award that would support a judgment. Relying on this, the Sixth Circuit has since held that a public-sector employee need not exhaust internal union grievances before filing a civil action. *Tierney v. Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990). Finally, the Third Circuit has squarely held that a public-sector union must provide nonmembers with an alternative to litigation but cannot require nonmembers to arbitrate constitutional claims and cannot enforce the award in nonconsensual arbitration as "final and binding." *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992). Even in the public sector, therefore, the *Hudson* procedure is not a consensual "arbitration" as envisioned by the Arbitration Act and section 301, but is merely an internal union remedy.

When faced with these public-sector cases, the Union strenuously attempted to distinguish them on the very basis that they arose in the public sector

(Brief, docket #45). By this change in tacks, the Union lost whatever weak support the tenuous analogy to public-sector cases had once provided it.

A judgment of a federal court confirming an arbitration award cloaks that award with the same finality, preclusive effect, and other attributes as any other judgment of the court. 9 U.S.C. §13; *see Parsons & Whittemore Ala. Mach. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482 (11th Cir. 1984); *Dalow Indus., Inc. v. Jordache Enter., Inc.*, 631 F. Supp. 744, 748 (S.D.N.Y. 1985). Before the federal courts can grant their *imprimatur* to an arbitration award, either under section 301 or under the Arbitration Act, the parties must have agreed to submit their dispute to arbitration. The Union's position in this case is fatally flawed because it fails to concede this bedrock proposition. In the absence of consent, Mr. Roummel's award was not an arbitration award at all, but was merely the product of the Union's own internal remedy.

By providing a fair internal remedy, the Union might fulfill its duty under *Vaca v. Sypes* to deal with nonmembers in good faith. *See Price v. UAW*, 927 F.2d 88 (2d Cir.), *cert. denied*, 112 S. Ct. 295 (1991). Consequently, if defendants ever choose to sue the Union for breach of this duty, the Union may argue that the process established in its Procedure discharges that duty. *See, id.* at 92-94. That issue, however, is not before this court. The only issue here is whether the Union is entitled to a federal court judgment confirming the award. The only question relevant to this issue is whether defendants agreed in writing to arbitration and to the entry of a subsequent judgment, and the patent answer to that question is "no."

Recommended Disposition

I recommend that defendants' motion for summary judgment be granted and that the court enter judgment refusing to confirm the award of July 27, 1990.

Dated: October 1, 1992

/s/ JOSEPH G. SCOVILLE
U.S. Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. §636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by W.D. Mich. L.R. 13(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

ORDER OF COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING *EN BANC*

(Filed August 23, 1994)

No. 93-1308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOCAL 951 OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,
Plaintiff-Appellant,

NATIONAL LABOR RELATIONS BOARD,
Intervenor,

v.

PHILLIP MULDER; CHARLES BUCK; LEON GIBBONS,
Defendants-Appellees.

ORDER

BEFORE: MARTIN, SUHRHEINRICH, and DAUGHTREY, *Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this

court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN
Leonard Green, *Clerk*

EXCERPT OF LOCAL 951 UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION—DISTRIBUTION CENTER CONTRACT
ARTICLE 3: UNION SECURITY

Local 951 United Food & Commercial Workers International Union

Distribution Center Contract

Robert Potter
President

Joe Crump
Secretary/Treasurer

Michael McMillian
Recorder

* * *

[4] ARTICLE 3:
UNION SECURITY

3.1 The Employer agrees not to enter into any other Agreement with any other labor organization during the life of this Agreement with respect to employees covered by this Agreement.

3.2 It shall be a continuing condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing and those who are not members on the execution date of this Agreement shall, following thirty (30) calendar days, become and remain members in good standing in the Union.

It shall also be a continuing condition of employment that all employees covered by this Agreement and hired on or after the date of execution shall, following thirty (30) calendar days, become and remain members in good standing in the Union.

For the purposes of the Union Security provision of this section, the execution date of this Agreement shall be considered its effective date.

To be a member of the Union in good standing as required by this section, an employee must tender to the Union the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership. Any employee who is required to be a member of the Union by this section and who fails to render such uniform dues and initiation fees shall not be retained as an employee in the bargaining unit so long as the Union has given written notice to

the Company and employee of such failure, and such failure is not cured by employee within seven (7) days of such notice. The Employer reserves the right to secure new employees from any source whatsoever.

Those employees who maintain a non-member status or change their status to a non-member status and are covered by the terms of this agreement shall be required to pay as a condition of employment, an initial service fee, monthly (or otherwise) service fees to the Union for the purpose of aiding the Union in defraying cost in connection with the Union's [5] obligations and responsibilities as the exclusive bargaining agent of the bargaining unit herein.

3.3 The Employer agrees, for the term of this Agreement, to deduct Union dues and/or service fees from the wages of the employees who individually certify in writing authorization for such deduction in a form authorized by law. The Employer agrees, in the case of new Union members, to deduct the Union initiation fee and in the case of a non-member, an initial service fee from the wages of any new or non-member Union employee who certifies in writing authorization for such deduction in a form authorized by law. It is the responsibility of the Union to obtain and deliver to the Employer such written authorization.

The Employer agrees to deliver all sums deducted in this manner to the designated financial officer of the Union, payable to the local Union. The Employer further agrees to advise the local Union Office within ten (10) days after information on any permanent transfers, promotions, discharges, or new hires is recorded by the Payroll Department in the corporate offices.

The Employer agrees to deduct an amount from the pay of each employee who is a Union member and who executes an appropriate voluntary checkoff authorization for the UFCW Active Ballot Club. Deductions shall be in the amount specified in the checkoff authorization form signed by the employee and deducted every week. The deduction shall continue for the life of this agreement for those employees who sign UFCW Active Ballot Club checkoff authorization forms unless they are revoked individually and in writing.

3.4 The Union agrees to indemnify the Company against any liability received or imposed upon the Company by reason of any action taken by it as directed by Article 2 and 3.

The Union further agrees to provide legal defense to any claims or to reimburse the Company for costs of legal defense of claims arising under the provisions of Article 2 and Article 3.

[6] STEWARDS

3.5 A. Steward coverage in the Distribution Center shall be as follows: One (1) Steward for each shift in each department, except for those departments which exist in separate building locations or separate Distribution Center complexes in which case there shall be one (1) Steward for each shift in each department and building or Distribution Center complex location.

B. Alternate Stewards may be designated by the Union to serve in absence of a regular Steward.

C. Union Stewards shall have top seniority only for the limited purposes of layoff and recall.

D. Employees in the following classifications and assignments cannot serve as Stewards:

Slot Control Clerk
Lead Persons
Shipping and Receiving Clerks
Depalletizer Operator
Lane Loader

E. If a Steward comes in to handle Union business on his own time, the Company shall have no responsibility or liability to pay for said time.

F. In the event of a change in department structure, the Company and the Union will meet to agree on amended Steward coverage.

G. All stewards will be given one (1) paid personal holiday per year (four (4) hours part-time, eight (8) hours full-time) to be used in conjunction with Union authorized Steward training conferences. This day will be granted upon thirty (30) days written notification to the Labor Relations Department by the local Union.

* * *

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951 SERVICE FEE REBATE PROCEDURE

3310 Eagle Park, N.E.
Grand Rapids, MI 49505

UFCW 951

Phone: Local-(616) 957-1790
Toll Free-1-800-999-0951

Local 951
United Food & Commercial Workers International Union
AFL/CIO & CLC

SERVICE FEE REBATE PROCEDURE

I. DEFINITIONS

For the purposes of this Service Fee Rebate Procedure, the following definitions shall apply:

"Union" shall mean the United Food and Commercial Workers Union, Local 951.

"Union and its Affiliates" shall mean the United Food and Commercial Workers Union, Local 951, AFL-CIO and CLC and the United Food and Commercial Workers International Union.

"Bargaining Unit" shall mean any group of employees on whose behalf the United Food and Commercial Workers Union, Local 951, acts as exclusive collective bargaining representative.

"Member" shall mean any individual who is a member of the United Food and Commercial Workers Union, Local 951. For the purposes of this Service Fee Rebate Procedure only, the definition of "member" includes both "membership in good standing" and "membership not in good standing".

"Non-Member" shall mean any individual who is part of a bargaining unit represented by the United Food and Commercial Workers Union, Local 951, but who is not a member of the Union.

"Fiscal year" shall mean the twelve (12) month period commencing with January 1 of any year and ending with December 31 of the same year.

"Membership year" shall mean the twelve (12) month period commencing with January 1 of any year and ending with December 31 of the same year.

"Service fee" shall mean an annually determined amount reflecting the portion of full member dues utilized by the Union and its affiliates for chargeable collective bargaining and contract administration services provided on behalf of non-members. The service fee charged to non-members shall not exceed the amount of full member dues.

"Valid objection" shall mean a timely objection to the amount of the annually determined Service Fee filed by a non-member in accordance with the terms of this rebate procedure.

"Objecting non-member" shall mean any non-member who files a valid objection to the amount of the annually determined service fee.

"Arbitrator" shall mean an Impartial Fee Determiner appointed in accordance with the American Arbitration Association "Rules for Impartial Determination of Union Fees" (copy attached hereto as Appendix A).

II. NOTICE

A. On or before January 15 of each year, the Union will send each non-member of record a notice containing the following information relevant to the service fee:

1. Notice of the right to object;

2. Notice of the possibility of a rebate of some portion of the service fee; and

3. Instructions for obtaining Financial Disclosure materials and filing a timely objection.

B. On or before April 15, 1989 (and on or before March 1 of each year thereafter), the Union will send the following information to each member responding to the notice in Paragraph 1 above:

1. A list of the Union's expenditures during the preceding fiscal year**, set forth by major category, and verified by a certified public accountant;

2. An identification of whether the major category of expense, or a portion thereof, is chargeable to objecting non-members;

3. The percentage of the previous year's full member dues chargeable to objecting non-members under applicable law;

4. A calculation of the previous year's chargeable percentage applied to the amount of the current year's full member dues;

5. The certified public accountant's explanation of the method used to calculate the chargeable proportion; and

6. A copy of this procedure.

C. Individuals who claim non-member status at other times during the current membership year will be provided the notice set forth in Section II A, above, within thirty days of claiming non-member status.

** For the first year that this procedure is in place (1989), Union expenditures for 1987 will be used in order to compile the financial information in a more expeditious manner.

III. OBJECTION

A. Any non-member who objects to the amount of the annually determined service fee must submit a *written* objection to the Union. The objection must be received by the Union at its offices, located at 3310 Eagle Park Drive, N.E., Grand Rapids, Michigan 49505, no later than May 15, 1989 (and no later than March 31 of each year thereafter). Individuals who claim non-member status at other times during the current membership year must file an objection within thirty days of the date of the letter forwarding the financial disclosure material described in Section II B above.

B. If one or more timely objections to the amount of the current year's annually determined service fee have been received, the appeal process set forth in Section IV below will be conducted, and all service fees collected from the objecting non-members will be placed into a flat rate interest bearing escrow account pending the outcome of the appeal process.

C. If one or more timely objections have already been received by the Union, all timely objections received from individuals claiming non-member status at other times during the membership year that are received by the Union before the arbitrator has issued the impartial determination of the service fee shall be included in the current year's arbitration process.

IV. APPEAL

STEP 1: Appeal to Local Union Executive Board

All non-members submitting timely objections to the amount of the Union-calculated service fee shall present the grounds for their appeal at the next

Supreme Court, U.S.
FILED
JAN 13 1995
OFFICE OF THE CLERK

No. 94-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 951, AFL-CIO AND CLC,

Petitioner,

v.

PHILLIP MULDER, CHARLES BUCK, AND LEON GIBBONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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January 13, 1995

23 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Were the lower federal courts correct in holding that they lacked jurisdiction to enforce against nonmember employees, who objected to the amount of agency fees demanded from them, an internal-union "rebate" scheme which culminated in two non-contractual, non-consensual, internal-union "arbitrations?"

2. Were the lower federal courts correct in refusing to summarily turn the results of two non-contractual, non-consensual, internal-union "arbitrations" into binding federal court judgments?

PARTIES TO THE PROCEEDINGS

Petitioner is the United Food and Commercial Workers, Local 951, AFL-CIO and CLC, a union representing employees of, *inter alia*, Meijer, Inc. Respondents are Phillip Mulder, Charles Buck and Leon Gibbons, three employees of Meijer who work within the bargaining unit covered by Local 951. Each Respondent has resigned from membership in Local 951 and filed objections pursuant to *Communications Workers v. Beck*, 487 U.S. 735 (1988).

The National Labor Relations Board ("NLRB") intervened successfully in the District Court and received a partial stay of the proceedings. However, the NLRB filed nothing further with the District Court regarding the merits of the case and nothing with the Court of Appeals. The NLRB, through the Solicitor General, has indicated to the Clerk of this Court that it will file nothing related to the instant Petition. As such, Respondents do not believe that the NLRB continues to be a "party to this proceeding."

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No. 94-926

IN THE

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OCTOBER TERM, 1994

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 951, AFL-CIO AND CLC,

Petitioner,

v.

PHILLIP MULDER, CHARLES BUCK, AND LEON GIBBONS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents Phillip Mulder, Charles Buck and Leon Gibbons ("Respondents" or "nonmembers") are employed by Meijer, Inc. ("Meijer"), a large supermarket chain based in Grand Rapids, Michigan. Pursuant to the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, Respondents are represented for purposes of collective bargaining by Petitioner United Food and Commercial Workers, Local 951, AFL-CIO and CLC. ("Petitioner" or "Local 951.")

The collective bargaining agreement negotiated by Meijer and Local 951 contains a "union security clause." This clause requires all covered employees to either join the union or pay a "service fee" as a condition of employment. However, this clause does not mention or in any way specify *how* Local 951 will deal with nonmember employees (like Respondents Mulder, Buck and

Gibbons) who object to the use of their service fees for nonrepresentational purposes, or *how* the union will calculate a reduced fee for those employees, as required by *Communications Workers v. Beck*, 487 U.S. 735 (1988).

Respondents were formerly members of Local 951, but each resigned in 1988 or 1989. Simultaneously with their resignations, each Respondent notified Local 951 that he objected under *Beck* to paying any amount of "service fees" except those used for collective bargaining, contract administration and grievance adjustment.

In response, Local 951 sent each Respondent its "Service Fee Rebate Procedure." (Petition for Certiorari, Appendix at A62-A68.) In pertinent part, this "Service Fee Rebate Procedure" creates a non-contractual, non-consensual, internal-union "arbitration" scheme to determine the chargeable amount of the "service fee." It is also critical to note that this "Service Fee Rebate Procedure" is not a part of the Meijer—Local 951 collective bargaining agreement, but rather was created internally and unilaterally by Local 951.[1]

Beginning on November 9, 1988, and at various times since, Respondents filed several unfair labor practice charges with the NLRB against Local 951 concerning the legality of the "Service Fee Rebate Procedure" and the amount of the "service fees" collected by Local 951. In those charges, Respondents requested the NLRB, *not* Local 951's internal "arbitrator," to determine the proper amount of the service fee that can be required under *Beck*. After investigation, the NLRB General Counsel issued formal complaints

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[1] The differences between the Meijer—Local 951 collective bargaining agreement and Local 951's internal "Service Fee Rebate Procedure" are dramatic. For example, while the voluntary arbitration provisions of the Meijer—Local 951 collective bargaining agreement create both a right of mutual selection of a single arbitrator and a mutually-selected tripartite "Grievance Adjustment Board," the "Service Fee Rebate Procedure" provides no such choices with regard to the compulsory "arbitration" which Local 951 seeks to foist upon the Respondents and other nonmembers who object to the amount of the "service fee."

against Local 951, which remain pending at this time before an administrative law judge.[2]

After the NLRB complaints were issued, Local 951 actually invoked against the Respondents the "arbitration" scheme contained in its "Service Fee Rebate Procedure." With regard to that scheme, it is undisputed, and the District Court so found, that: a) none of the Respondents was given any opportunity to be involved in the selection of Local 951's "arbitrators;" b) none of the Respondents ever consented to the selection of those "arbitrators" or the rules contained in the "Service Fee Rebate Procedure;" and c) none of the Respondents agreed to be bound by any decisions rendered by Local 951's "arbitrators," nor did they ever agree that such "arbitration" decisions would become final and binding so as to permit the entry of federal court judgments. In short, it is undisputed—and the District Court so found—that there was no agreement whatsoever between Local 951 and the Respondents to arbitrate any dispute and be bound by the result! (Report and Recommendation of the Magistrate Judge, reprinted in Petition for Certiorari, Appendix at A32; Decision of the District Court, reprinted in Petition for Certiorari, Appendix at A21.)

Nevertheless, Local 951 twice sued the Respondents, seeking to have the federal courts summarily "confirm" the results of those non-consensual "arbitrations" and turn them into binding judgments with *res judicata* and collateral estoppel effect. The NLRB successfully intervened in the federal court lawsuits, over the objection of Local 951, and received a partial stay against Local 951.[3]

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[2] The formal NLRB complaints challenge the legality of many aspects of Local 951's "Service Fee Rebate Procedure," as well as Local 951's inclusion of organizing and similar expenses in the chargeable amount of the fee demanded from the Respondents.

[3] In its Brief in Support of the Petition for Certiorari at 6, n.1, the Petitioner misstates one aspect of the proceedings below. Contrary to the statement of the Petitioner, the NLRB *successfully* sought to stay Local 951's lawsuits. (Appendices A and B.) It was *only* the Respondents' ultimately successful Motion for Summary Judgment which actually proceeded further in the District Court.

On Respondents' Motion for Summary Judgment, the Magistrate Judge and the District Court refused to confirm Local 951's "arbitrations," holding that the federal courts had no jurisdiction to enforce such non-consensual, non-contractual, internal-union proceedings.[4] A unanimous panel of the Sixth Circuit affirmed, and Local 951's Petition for Rehearing and Rehearing *en banc* was denied, with no judge in active service voting to rehear the case.[5]

REASONS FOR DENYING THE WRIT

THE LOWER COURTS WERE CORRECT IN REFUSING TO CONFIRM LOCAL 951'S TWO NON-CONTRACTUAL, NON-CONSENSUAL, INTERNALLY GENERATED "ARBITRATIONS" AND TURN THEM INTO BINDING JUDGMENTS. IT IS UNDISPUTED THAT THERE WAS NO AGREEMENT BETWEEN LOCAL 951 AND THE RESPONDENTS TO ARBITRATE ANY DISPUTE AND BE BOUND BY THE RESULT, AND THUS NO LEGITIMATE ARBITRATION AWARDS TO CONFIRM.

A.) The Lower Courts Were Absolutely Faithful To This Court's Precedents.

It is undisputed that there was no agreement between Local 951 and the Respondents to arbitrate and be bound by the result. (Report and Recommendation of the Magistrate Judge, reprinted in Petition for Certiorari, Appendix at A32; Decision of the District Court, reprinted in Petition for Certiorari, Appendix at A21). That single fact is determinative, for this Court has long held that the *sine qua non* of any enforceable arbitration award is *agreement* and

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[4] The Report and Recommendation of the Magistrate Judge is unofficially reported at 141 L.R.R.M. (BNA) 2449 (W.D. Mich. 1992). The decision of the District Court is officially reported at 812 F. Supp. 754 (W.D. Mich. 1993).

[5] The decision of the Court of Appeals for the Sixth Circuit is officially reported at 31 F.3d 365 (1994).

consent among the parties to subject their dispute to arbitration and be bound by the result. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

> The Congress ... assigned to the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.

Id. at 582 (emphasis added); *AT&T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) (reaffirming *Warrior & Gulf Navigation Co.*, and holding that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law"); *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991); *Litton Financial Printing v. NLRB*, ___U.S. ___, 111 S. Ct. 2215, 2222-2223 (1991) ("We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.... [T]he statutory policy [of the NLRA is] that arbitration is not compulsory.")

Local 951's Petition fails to cite, let alone distinguish, this Court's many governing precedents upon which the Magistrate Judge, District Judge, and Sixth Circuit expressly relied in refusing to confirm the non-contractual, non-consensual, internal-union "arbitrations." Instead, Local 951 relies upon a series of "naked *ipse dixits*" (Report and Recommendation of the Magistrate Judge, reprinted in Petition for Certiorari, Appendix at A32) to ignore and obscure this Court's very consistent holdings that "arbitration is a matter of contract and a party cannot be required to submit to

arbitration any dispute which he has not agreed to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

Local 951 clouds the real issue—whether two non-consensual "arbitrations" may be summarily confirmed and turned into binding federal court judgments—by cleverly insinuating that its lawsuits against Respondents actually concern the enforcement (or arise under the "penumbras") of the collective bargaining agreement negotiated between itself and Meijer. (Petition for Certiorari at 13-14.) The reality is that Local 951's quixotic lawsuits to confirm its non-consensual, non-contractual "arbitrations" do not arise from or in any way implicate the Meijer—Local 951 collective bargaining agreement (or any other "contract" as defined by § 301, 29 U.S.C. § 185, or the Federal Arbitration Act), but rather arise solely from the internal-union "Service Fee Rebate Procedure."

> The arbitrations at issue did not arise from a collective bargaining agreement or any other agreement between [Local 951] and [the Respondents] but rather from the internal-Union Procedure. The internal Procedure was unilaterally instituted by the Union and was not the subject of an agreement between the Union and the employees. Thus, the Procedure did not contemplate or include an agreement by [the Respondents] to arbitrate their disputes with the Union. Absent such an agreement, the arbitrators' judgments cannot be enforced by this Court.

(Opinion of the District Court, reprinted in Petition for Certiorari, Appendix at A23.)

Furthermore, Local 951's lawsuits do not require any interpretation, review or enforcement of the Meijer—Local 951 collective bargaining agreement, since that collective bargaining agreement and its union security clause are silent concerning *how* Local 951 will deal with nonmember employees who object to the use of their service fees, or *how* the union will calculate a reduced fee for those employees as required by *Beck*. As such, the mere existence of that collective bargaining agreement provides no jurisdictional basis for

the confirmation of the two non-consensual, non-contractual "arbitrations" at issue in this case. While Local 951 struggles mightily to make its confirmation lawsuits appear to be nothing more than routine disputes arising under the Meijer—Local 951 grievance and arbitration clause—and thus within the "penumbras" of § 301—nothing could be further from the truth. The Respondents' *Beck* objections were *not* processed under the terms of the Meijer—Local 951 collective bargaining agreement, but rather under Local 951's "Service Fee Rebate Procedure" only. (Opinion of the District Court, reprinted in Petition for Certiorari, Appendix at A23.)

In short, the decisions of the Magistrate Judge, District Judge and Court of Appeals were faithful to this Court's longstanding precedents upholding arbitrations *only* where the parties have consented to such a process and agreed to be bound by the result. This case provides the Court with no reason to deviate from its longstanding precedents.

B.) This Court Has Recognized That Employees Challenging A Union's Agency Fee Seizures May Choose From Several Different Fora To Protect Their Rights.

In *Beck*, this Court specifically held that nonmember employees have an absolute right to challenge a union's agency fee seizures before either the NLRB or the federal courts. *Beck*, 487 U.S. at 742-45. Nothing in *Beck* (or this Court's earlier cases such as *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)) supports the notion that the mere existence of a union security clause in a collective bargaining agreement enables a union to compel a nonmember to use a separate, non-contractual, non-consensual, internal-union procedure as his *exclusive* means of challenging the agency fee seizures. The Sixth Circuit properly construed *Beck* and *Hudson* to require only that informal procedures be made available to nonmember employees, not that the employees use them as an exclusive forum. (Decision of the Sixth Circuit, reprinted in

Petition for Certiorari, Appendix at A5, citing *Hudson*, 475 U.S. at 308.)

Moreover, it is not a novel concept in labor law that employees may freely choose from among several "tracks" to protect themselves from unlawful union conduct. In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held that employees have the right to litigate duty of fair representation claims in either the NLRB's forum or separately, in federal court. Here, the Respondents made their choice—the NLRB—and Local 951 does not like it, particularly since the NLRB has agreed with the Respondents and issued formal complaints challenging several aspects of Local 951's procedures and seizures. *See* note 2, *infra.*

Under the principles of *Beck* and *Vaca v. Sipes*, however, Local 951 cannot suddenly thrust its own internal, non-consensual "forum" in front of the Respondents and by doing so invalidate the choice-of-forum that they had previously made. Given the fact that Respondents chose to place the underlying statutory, duty of fair representation and *Beck* issues before the NLRB, Local 951's internal "arbitrations" and subsequent lawsuits are little more than procedural maneuvers designed to trump the NLRB and bully the Respondents and their fellow employees.[6]

A careful review shows Local 951's position to be curiously self-contradictory. At the outset, Local 951 innocently claims that its "Service Fee Rebate Procedure" contains an appeal mechanism "which *may* be invoked by non-Union, bargaining unit members who object to the Union's calculation of the chargeable portion of the service fee." (Petition for Certiorari at 5.) Stated this way,

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[6] Respondents submit that few of their fellow employees will have the fortitude to object to Local 951's agency fee calculations if the result is that they must hire a lawyer and annually defend against Local 951's federal court confirmation lawsuits. They also believe that Local 951 quite clearly recognizes the chilling effect of its confirmation lawsuits on nonmembers. *See Complete Auto Transit v. Reis*, 451 U.S. 401 (1981) and *Building Material & Dump Truck Drivers v. Traweek*, 867 F.2d 500, 507-08 (9th Cir. 1989), which immunized individual employees from § 301 lawsuits for precisely this reason.

Local 951 appears to be doing a good thing, by giving the Respondents an opportunity *if they so choose* to avoid formal litigation before the NLRB or the courts. For the remainder of its Petition, however, Local 951 retreats to *ipse dixits* and insists that the Respondents have no choice at all—they are *compelled* by some mysterious legal force (or "penumbras") to use *only* the internal-union "arbitration" procedure, whether or not they have previously chosen another forum, such as the NLRB. To make matters worse for the Respondents, Local 951's brand of compelled "arbitration" automatically converts into a binding federal court judgment.

The Magistrate Judge precisely summarized the error in Local 951's position and his words bear repeating. He stated:

> By analogy to [*Chicago Teachers Union v.] Hudson*, ... the Union argue[s] (although *Beck* never addressed the question) that it was obliged to grant objecting nonmembers an internal procedure, just as a public-sector union is required to do, to resolve fee disputes. From this assumption, the Union leapt to the conclusion that the outcome of the procedure would support a judgment of the court.
>
> In so arguing, the Union mistook *duty* for *power*. By analogy to *Hudson*, the Union has a duty to provide nonmembers with an impartial forum for resolving fee disputes. The Union has yet to point to any source of *power* to coerce nonmembers to avail themselves of such a forum if they are unwilling to do so, such that the result of the proceeding will support a judgment.

(Report and Recommendation, reprinted in Petition for Certiorari, Appendix at A51, emphasis in original.)

The Magistrate Judge's analysis of Local 951's position and its lack of legal support in this Court's cases was flawless. None of the decisions protecting the right of employees to refrain from funding a union's political and non-collective bargaining agenda supports the Kafkaesque "logic" that they are compelled to "arbitrate" even when they have not agreed to be bound and

steadfastly refuse to do so. *Hudson*, 475 U.S. at 308 n.21 ("arbitrator's decision would not receive preclusive effect..."); *Tierney v. City of Toledo*, 917 F.2d 929, 939-40 (6th. Cir. 1990) (striking down provision in union rebate plan requiring "exhaustion" of internal-union procedures); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992) (while union may have a duty to provide an internal procedure as an alternative to litigation, there is no *requirement* that employees actually use it); *Abrams v. CWA*, 818 F. Supp. 393 (D.D.C. 1993) (same).

In short, nonmember employees have several fora from which to choose in challenging a union's agency fee seizures, and it is their choice, not the union's, which governs. For this reason, Local 951's attempt to foist its internal "arbitration" forum upon the Respondents must fail!

C.) This Case Presents No Issue That Would Warrant The Issuance Of The Writ.

Absent from Local 951's Petition for Certiorari is any discussion of a conflict among the circuit courts with regard to the issues presented in this case, because none exists! Indeed, the only other federal decisions directly applying this Court's arbitration precedents to the agency fee context wholeheartedly agree with the result reached here. *Hohe v. Casey*, 956 F.2d at 408-09; *Abrams v. CWA*, 818 F. Supp. at 406-07.

Nor does Local 951 cite any overriding public policy reason for this Court to grant review in this case. The Court's precedents rejecting compelled "arbitration" are clear and unmistakable. No public policy interest is served by forcing non-consenting employees to utilize an internal-union procedure as the sole and exclusive forum to protect their rights under *Beck* and the duty of fair representation.

Local 951 attempts to pander to this Court by arguing that "the floodgates" will open unless this Court condemns nonmembers to non-consensual internal-union fora. (Petition for Certiorari at 11.)

This argument is remarkable, for it is Local 951 which apparently intends to annually re-file its "confirmation" lawsuits *ad nauseam*. In contrast, most of the legal issues raised by the Respondents in their NLRB filings (*e.g.*, whether organizing expenses are chargeable) should not recur once authoritatively decided. So who is flooding the courts, nonmember employees like the Respondents or Local 951?

In any event, *Beck* unequivocally permits nonmember employees to raise their claims before either the NLRB or the federal courts. The courts can easily decide those *Beck* cases that come before them, and indeed, have a duty to do so. Arguments concerning a "flood"—to alarm the Court into mandating use of non-consensual, non-contractual, internal-union "arbitrations"—are misleading and wrong. Moreover, the Due Process Clause as well as Article III of the Constitution would be violated if such non-consensual "arbitrations" were mandated and given the force of law.

CONCLUSION

The Petition should be denied; alternatively, this Court should grant the Petition and summarily affirm the decision of the Court of Appeals.

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January 13, 1995

APPENDIX A

ORDER OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

December 9, 1991

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOCAL 951 UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO,	)	[File & Clerk's stamp omitted in printing]
Plaintiff,	)	Case No. 1:91cv 623
v.	)	Honorable Douglas W. Hillman
PHILLIP MULDER, et al.,	)	
Defendants.	)	

ORDER ALLOWING INTERVENTION OF NATIONAL LABOR RELATIONS BOARD AND STAYING PROCEEDINGS IN PART

The National Labor Relations Board (NLRB) has moved for leave to intervene as a party defendant in the captioned case. The NLRB has also moved to stay all proceedings in this action until resolution of unfair labor practice charges against plaintiff presently pending before the NLRB. Plaintiff opposes both motions; defendants do not oppose intervention but oppose the stay. The court conducted a hearing on both motions on December 9, 1991, and set forth oral findings and conclusions for the record. For the reasons set forth on the record:

IT IS ORDERED that the motion for intervention of the National Labor Relations Board (docket # 19) be and hereby is GRANTED, the court finding that the NLRB meets the requirements of Fed. R. Civ. P. 24(b) for permissive intervention. Intervening defendant NLRB is granted 60 days in which to file its answer or other responsive pleading.

IT IS FURTHER ORDERED that the motion of the NLRB for stay (docket # 20) be and hereby is GRANTED IN PART and DENIED IN PART. All proceedings in this action are hereby stayed except for proceedings on the pending motion of defendants (docket # 6) for dismissal or for summary judgment. With regard to that motion, plaintiff is hereby granted ten days in which to file a supplemental brief opposing the motion. Defendants are granted ten days after service of plaintiff's supplemental brief in which to respond. NLRB may, if it so desires, file a brief setting forth its position within the time allowed to defendants herein. Plaintiff and defendants may respond to any submission of the NLRB within ten days after service. All briefs filed hereunder shall not exceed ten pages in length. The court hereby notifies the parties that it elects to treat defendants' motion as a motion for summary judgment, as both plaintiff and defendants have submitted matter outside the pleadings. *See* **Fed. R. Civ. P.** 12(b)(6).

IT IS FURTHER ORDERED that the denial of NLRB's motion for a complete stay is without prejudice, and that the NLRB may renew its motion if defendants' motion for summary judgment is denied.

DONE AND ORDERED this 9th day of December, 1991.

/s/
Joseph G. Scoville
U. S. Magistrate Judge

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

March 3, 1992

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED FOOD & COMMERCIAL WORKERS LOCAL 951,

[File & Clerk's stamp omitted in printing]

Plaintiff,

-vs-

Case No. 1:91-cv-623

PHILIP MULDER, CHARLES BUCK, AND LEON GIBBONS,

Defendants,

and

NATIONAL LABOR RELATIONS BOARD,

Intervenor.

_____/

ORDER OVERRULING OBJECTIONS AND AFFIRMING MAGISTRATE JUDGE'S DECEMBER 9, 1991 ORDER

In accordance with the opinion issued today,

IT IS ORDERED that the United Food & Commercial Workers, local 951's objections (Docket # 31) to United States Magistrate Judge Joseph G. Scoville's order of December 9, 1991 are **OVERRULED.**

IT IS FURTHER ORDERED that United States Magistrate Judge Joseph G. Scoville's order of December 9, 1991 (Docket # 29) is **AFFIRMED**.

/s/
Douglas W. Hillman
Senior Judge

Dated: MAR 3 1992

(3)

Supreme Court, U.S.
FILED
FEB 15 1995
OFFICE OF THE CLERK

No. 94-926

IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951, AFL-CIO AND CLC,
Petitioner,

NATIONAL LABOR RELATIONS BOARD,
Intervenor,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 94-926

IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951, AFL-CIO AND CLC,
Petitioner,

NATIONAL LABOR RELATIONS BOARD,
Intervenor,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petitioner, United Food and Commercial Workers Local 951, AFL-CIO and CLC, respectfully submits the following Reply to Respondents' Brief in Opposition to the above-captioned Petition for a Writ of Certiorari.

INTRODUCTION

The standard for breach of the duty of fair representation serves as the foundation for any non-member complaint regarding the obligation to remit union service fees. *See Communication Workers of America v. Beck*, 487 U.S. 735, 762-763 (1988).

Union service fee arbitrations are subject to the analytical framework dictated by the duty of fair representation. Hence, the standard for evaluation of any aspect of non-member union service fee collection is whether the union has acted in an arbitrary, capricious or bad faith manner. *See Vaca v. Sipes*, 386 U.S. 171 (1967). This petition presents a case of first impression, to determine whether §301 of the Labor Management Relations Act, 29 U.S.C. §185, confers federal jurisdiction to confirm, modify or vacate service fee arbitration awards issued pursuant to *Communication Workers of America v. Beck's* mandate. The arguments set forth in Respondents' Brief focus upon the role of consent in arbitration, and compel this Court to address two fundamental issues with respect to whether §301 jurisdiction is warranted: (1) what is the role of arbitration in non-member service fee disputes in general? and (2) in the unique context of the duty of fair representation, are traditional notions of "consent" to arbitration inapplicable? The following brief reply will illustrate that Respondents' reliance upon the issue of consent is misplaced in the context of private sector fee arbitration.

ARGUMENT

The intended role of arbitration is best illustrated in the analogous law of the public sector, wherein non-union member constitutional rights must be protected against state action. In *Kidwell v. Transportation Communications International Union*, 946 F.2d 283, 303 (4th Cir. 1991), *cert denied*, _____ U.S. _____, _____ S.Ct. _____, 118 L.Ed.2d 423 (1992), the United States Court of Appeals for the Fourth Circuit provided a concise summary of the public sector's judicial path toward upholding the integrity of fee arbitration.[1] It is evident from the *Kidwell* court's analysis that the courts may reserve jurisdiction over any constitutional issues that may arise. However, if the arbitration procedure itself is constitutional on its face and as implemented, then there will not likely be any residual grounds for judicial challenge pursuant to 42 U.S.C. §1983. For example, the *Kidwell* court notes that, in *Chicago Teachers Union v. Hudson*, this Court required unions to "provide for a reasonably prompt decision by an impartial decision maker," and established the constitutional minimums for such a procedure, adding that the "arbitrator's decision would not receive preclusive effect *in any subsequent §1983 action.*" (Emphasis added). *See Kidwell*, 946 F.2d at 283, citing *Chicago Teachers Union v. Hudson*, 475 U.S. at 307, 308 n. 21. It follows that only a residual constitutional violation would trigger a §1983 action.

The *Kidwell* court also noted that the Sixth Circuit, in *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990) did not require exhaustion of

[1] In *Kidwell*, the Fourth Circuit declined to rule upon the issue of arbitration in view of dismissal of the case on other grounds.

arbitration prior to bringing *constitutional* claims in federal court (though the Court did not define a "constitutional claim"). *See Kidwell*, 946 at 303, *citing Tierney*, 917 F.2d at 940. The *Kidwell* court quoted most extensively from *Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2852 (1991), in the following analysis:

> [T]he court [of appeals] stated that judicial review without prior arbitration was limited to ensuring that the proper procedure—fair share notice, an impartial decision maker to determine fee amount, and escrow protection—was followed. [922 F.2d] at 1314. '[T]he singular role of the federal courts in reviewing the adequacy of fair share notice is to determine whether the notice gives the non-union members enough information to challenge the basis for the fee.' *Id.* It noted that, if the decision on fee calculation was adverse to the plaintiffs, they could seek review in the federal courts. *Id.* It refused to become involved in more specific determinations and micromanagement prior to arbitration.

See Kidwell, 946 F.2d at 303. Significantly, the Seventh Circuit's *Hudson* decision does not mention any individualized "consent" to arbitration by the objecting non-union members.

The *Kidwell* court's gathering of precedents on the issue of fee arbitration highlights several key elements in the judicial policy underlying fee arbitration—elements which the Respondents disregard. First, the very fact that this Court established constitutional guidelines for fee

arbitration procedures is itself significant.[2] Further, the fact that the federal courts retain residual jurisdiction over constitutional (*i.e.* §1983) claims is secondary to the goal that a facially constitutional procedure, constitutionally implemented, should leave behind *no* residual constitutional claims for the courts to adjudicate.[3] Hence, the Seventh Circuit specifically directed arbitration first, and judicial review second.[4]

Applying the analogous law of the public sector to the facts presented, if a private sector arbitration procedure conforms facially to the duty of fair representation, and is implemented in accordance with the duty of fair representation, then said procedure should be entitled to the same deference afforded any other labor arbitration proceeding undertaken under the duty of fair representation. The Respondents' "choice of fora" argument presumes that *all* union service fee calculations *will* violate the duty of fair representation. This "presumption" is evident from Respondents'

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[2] *See Chicago Teachers Union v. Hudson*, 475 U.S. at 310.

[3] The same reasoning renders Respondents' citation of *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992) inapposite. *Hohe*, a public sector case, premises its rejection of the arbitration procedure upon the prohibition against exhaustion requirements in §1983 cases. *See e.g. Patsy v. Board of Regents of Florida*, 457 U.S. 496, 516 (1982); *Hohe*, 956 F.2d at 408, 409. Petitioner does not dispute that *constitutional* issues will always have a forum in the federal courts, notwithstanding the existence of arbitration procedures. However, this point presumes that constitutional issues remain as a result of the drafting or implementation of the arbitration procedure.

[4] *See Hudson v. Chicago Teachers Union*, 922 F.2d 1306 at 1314.

unwillingness to even countenance the possibility that the duty of fair representation (a far lesser standard than the constitutional standard found in the public sector) could ever be met through a fairly conducted arbitration procedure.

It is clear from the analogous law of the public sector, emanating from this Court's decision in *Hudson*, that constitutional guidelines for fee arbitration procedures were not established merely to provide a costly and meaningless prelude to litigation. If such procedures can adequately protect the constitutional rights of public sector objectors, while, at the same time, eliminate the need for courts to "micromanage" fee calculations, then it is clear that arbitration of fee disputes in the public sector was intended to carry some meaningful effect.

Respondents' Brief avoids discussion of the proper foundation for analysis—to wit: whether a union has acted in an arbitrary, capricious or bad faith manner toward a non-member. *See Vaca v. Sipes*, 386 U.S. 171 (1967). The unique context of fee-arbitration, in view of the duty of fair representation standard, renders inapposite the Respondents' reliance upon *A T & T Technologies, Inc. v. CWA*, 475 U.S. 643 (1986) and *Litton Financial Printing*, _____ U.S. _____, 111 S.Ct. 2215 (1991). The decision of the District Court for the District of Columbia in *Abrams v. Communication Workers of America*, 818 F.Supp. 393 (D.D.C. 1993), is also unpersuasive for its reliance upon the same precedents. The *Abrams* court's characterization of the fee dispute resolution process before it as "forced arbitration" ignores the judicially affirmed role of arbitration in service fee

disputes, and makes an inappropriate analogy to employer/union arbitration agreements. The *Abrams* court erroneously concluded, as do Respondents, that cases such as *Gateway Coal Co. v. Mineworkers,* 414 U.S. 368 (1974) and *A T & T Technologies,* require the consent of non-union members to service fee arbitrations. However, in *Gateway Coal* and *A T & T Technologies,* the "no strike" clause, and other significant consideration, serve as the contractual *quid pro quo* for the grievance arbitration mechanism between the employer and the union.

Respondents dwell extensively on the issue of individualized consent, even though "lack of consent" is not even addressed as a significant issue in public sector decisions which are subject to the higher constitutional standard. Consent is even less of an issue under the standard for duty of fair representation. The decisions of this Court, long followed, have afforded unions "a wide range of reasonableness" in the dispatch of the duty of fair representation. *See e.g. Steel Workers v. Rawson,* 495 U.S. 362 (1990); *Humphrey v. Moore,* 375 U.S. 335 (1964) and *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). Indeed, in the context of the duty of fair representation, employees are required to exhaust the grievance procedure even though said employees, as "individuals," might prefer to have their cases heard directly in the federal courts without having to exhaust arbitration. *See Monroe v. UAW,* 723 F.2d 22 (6th Cir. 1983). Indeed, a union may be deemed to have fully executed its duty of fair representation even where it *refuses* to arbitrate. *See Balowski v. International Union UAW,* 372 F.2d 829 (6th Cir. 1967). A union's

processing of any type of grievance or dispute to arbitration in good faith fully complies with the duty of fair representation.

Thus, Respondents' focus on the "choice of fora" issue begs the question of whether a fairly drafted and fairly implemented arbitration procedure will even leave behind a residual duty of fair representation question to be litigated in any forum. It is entirely appropriate and consistent with prior case law governing the duty of fair representation that a grievance procedure may serve to fully discharge the duty of fair representation if appropriately drafted and administered. Accordingly, said arbitration award should be entitled to the same statutory appeal mechanism as other arbitration awards emanating from the federal policy of labor stability, which is the foundation of §301 of the Labor Management Relations Act.

CONCLUSION

The arguments raised in the Respondents' Brief in Opposition are unpersuasive, and exemplify the need for this Court's review of the important issues presented by the case below. For the reasons stated herein and in its Petition, Petitioner United Food and Commercial Workers Union Local 951 respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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